U.S.C. § 423(d); *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). First, the claimant must demonstrate "an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Second, the impairment or impairments must be severe enough that she is unable to do her previous work and cannot, based on her age, education, and work experience, "engage in any other kind of substantial gainful work which exists in the national economy." *Id.* § 423(d)(2)(A).

To determine whether a claimant is disabled, an ALJ is required to employ a five-step sequential analysis examining: (1) whether the claimant is engaging in "substantial gainful activity"; (2) whether the claimant has a "severe medically determinable physical or mental impairment" or combination of impairments that has lasted for more than 12 months; (3) whether the impairment "meets or equals" one of the listings in the regulations; (4) whether, given the claimant's RFC, she can still do her "past relevant work"; and (5) whether the claimant "can make an adjustment to other work." *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012), *superseded by regulation on other grounds*; *see* 20 C.F.R. § 404.1520(a).

Here, at step one, the ALJ determined Plaintiff had not engaged in substantial gainful activity since her amended alleged onset date of November 25, 2017. (AR 17.) At step two, the ALJ concluded Plaintiff had the following severe impairments: spondylosis, depression, anxiety, DDD, and ADHD. (*Id.*) At step three, the ALJ found Plaintiff's impairments, or combination of impairments, did not meet or equal any of the listed impairments in 20 C.F.R. Part 404, Subpt. P, App. 1 (the "Listings"). (*Id.*)

Further, at step three the ALJ found Plaintiff had the residual functional capacity to perform light work with the following limitations:

- be on her feet for six hours in an eight-hour day and seated for the remaining two hours;
- ability to sit down at least once per hour to be able to change positions;
- occasional pushing, pulling, climbing, balancing, stooping, or kneeling;

- no temperature extremes, excessive levels of wetness or humidity;
- no occupational hazards, unprotected heights, dangerous machinery, ropes, ladders, or scaffolds;
- limited to jobs involving no more than simple, routine, repetitive tasks that would have been performed in a low-stress work environment, defined as one involving no high-volume productivity requirements and very infrequent unexpected changes;
- and no more than occasional interaction with the public, co-workers, and supervisors.

(AR 20.) At step four, the ALJ determined Plaintiff could not perform her past relevant work. (AR 24.) At step five, however, the ALJ found there were other occupations Plaintiff could perform such as non-postal mail clerk, marker, and photocopying machine operator. (AR 24-25.) For these reasons, the ALJ concluded Plaintiff was not disabled. (AR 26-27.) The Appeals Council denied Plaintiff's request for review of the ALJ's decision on May 23, 2022, and thereby made the ALJ's decision final. (AR 1-6.) Plaintiff then sought review in this Court. (Dkt. No. 13.) In accordance with Civil Local Rule 16-5, the parties filed cross-motions for summary judgment. (Dkt. Nos. 13-1, 14.)

II. Issues for Review

1. Whether the ALJ erred in determining Plaintiff's residual functional capacity ("RFC")?

    a) Whether the ALJ erred in evaluating the medical evidence?

    b) Whether the ALJ erred in rejecting Plaintiff's subjective symptom testimony?

2. Whether the ALJ erred in relying on "incomplete and improper vocational testimony in determining that [Plaintiff] can perform alternative occupations"? (Dkt. No. 13-1 at 2.)

    a) Whether the ALJ "curbed [Plaintiff] counsel's right to cross-examine the vocational witness"? (*Id.*)

3. Whether to remand for an award of benefits or further proceedings?

DISCUSSION

I. Medical Opinion Evidence

The Ninth Circuit has applied the Commissioner's new regulatory framework for evaluating medical opinions for applications filed on or after March 27, 2017. *See Woods v.*

Kijakazi, 32 F.4th 785, 789-792 (9th Cir. 2022); *see also* 20 C.F.R. §§ 404.1520c, 416.920c (2017). The new framework eliminates a hierarchy of or deference to medical opinions, and instead uses factors to determine the persuasiveness of a medical opinion. *See Woods*, 32 F.4th at 789-792. The factors are: "(1) supportability; (2) consistency; (3) relationship with the claimant; (4) specialization; and (5) other factors, such as evidence showing a medical source has familiarity with the other evidence in the claim or an understanding of our disability program's policies and evidentiary requirements." *P.H. v. Saul*, No. 19-cv-04800-VKD, 2021 WL 965330, at *3 (N.D. Cal. Mar. 15, 2021) (cleaned up) (quoting 20 C.F.R. § 404.1520c(a), (c)(1)-(5), § 416.920c(a), (c)(1)-(5)).

The most important factors in evaluating the persuasiveness of medical opinions are supportability and consistency. *See Woods*, 32 F.4th at 791 (citing 20 C.F.R. § 404.1520c(a)). "Supportability means the extent to which a medical source supports the medical opinion by explaining the relevant objective medical evidence." *Id.* at 791-92 (cleaned up) (citing 20 C.F.R. § 404.1520c(c)(1)). "Consistency means the extent to which a medical opinion is consistent with the evidence from other medical sources and nonmedical sources in the claim." *Id.* at 792 (cleaned up) (citing 20 C.F.R. § 404.1520c(c)(2)). The third factor—"relationship with the claimant" encompasses "the length and purpose of the treatment relationship, the frequency of examinations, the kinds and extent of examinations that the medical source has performed, ... and whether the medical source has examined the claimant or merely reviewed the claimant's records." *Id.* at 792 (citing 20 C.F. R. § 404.1520c(c)(3)(i)-(v)). The ALJ must explain how he considered supportability and consistency, and may, but is not required to explain how he considered factors three, four, and five. *See id.* at 792; *see also* 20 C.F.R. § 404.1520c(b)(2).

Under the new framework, the ALJ is no longer required to "provide specific and legitimate reasons for rejecting an examining doctor's opinion." *Woods*, 32 F.4th at 787. Rather, the ALJ's decision must "simply be supported by substantial evidence." *Id.* The "ALJ cannot reject an examining or treating doctor's opinion as unsupported or inconsistent without providing an explanation supported by substantial evidence." *Id.* at 792 (cleaned up).

"The agency must articulate how persuasive it finds all of the medical opinions and explain how it considered the supportability and consistency factors in reaching these findings." *Id.* (cleaned up) (citing 20 C.F.R. §§ 404.1520c(b), 404.1520c(b)(2).

Plaintiff argues the ALJ erred in discounting the opinion of her treating psychiatrist—Dr. Allen. In January 2021, Dr. Allen opined Plaintiff "[was] not able to return to her past work or any type of work due to severe depression and anxiety." (AR 1918.) Dr. Allen noted Plaintiff's "multiple [past] traumas hinder[ed] her from working again" and that Plaintiff could not "carry out [job] tasks or interact with coworkers in a productive manner." (*Id.*) A month later, in a mental medical source statement, Dr. Allen diagnosed Plaintiff with major depressive disorder, an unspecified anxiety disorder, post-traumatic stress disorder (PTSD), and ADHD. (AR 1920.) In the same statement, Dr. Allen found Plaintiff possessed the following extreme[2] limitations:

- ability to remember locations and work-like procedures;
- ability to understand and remember detailed instructions;
- ability to carry out detailed instructions;
- ability to maintain attention and concentration for extended periods;
- ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances;
- ability to sustain an ordinary routine without special supervision;
- ability to work in coordination with or proximity to others without being unduly distracted by them;
- ability to make simple work-related decisions;
- ability to complete a normal workday/workweek without interruptions from psychologically based symptoms;
- ability to ask simple questions or request assistance;
- ability to accept instructions and to respond appropriately to criticism from supervisors;
- restriction of understanding, remembering, or applying information;
- difficulty in interacting with others;
- and deficiencies of concentration, persistence, or maintaining pace.

(AR 1921-23.) Due to Plaintiff's impairments, Dr. Allen determined Plaintiff would be absent

[2] The definition of an "extreme" limitation is the "ability to perform designated work-related mental functions, but will have limitations that impair the effective performance of the task incrementally for a total of more than 30% of the eight-hour workday of a forty-hour workweek." (AR 1921.)

from work more than four days per month. (AR 1923.)

The ALJ found Dr. Allen's opinion unpersuasive because his opinion (1) "[was] inconsistent with the claimant's medical records during the relevant period that included conservative treatment and generally normal examinations," and (2) "ha[d] minimal relevance to the relevant period." (AR 24.) I agree with Plaintiff's contention that the ALJ's rejection of Dr. Allen's medical opinion is not supported by substantial evidence.

First, the ALJ's conclusion that Dr. Allen's opinion is "inconsistent with the claimant's medical records during the relevant period that included generally normal examinations" is not supported by substantial evidence. (AR 24.) The ALJ determined Plaintiff's mental status examinations from September 2016 to March 2018 were "generally normal." (AR 22.) However, the ALJ erred by ignoring the contrary medical evidence and focusing instead on the limited evidence which supported his finding of non-disability. *See Holohan v. Massanari*, 246 F.3d 1195, 1207 (9th Cir. 2001). "An ALJ may not cherry-pick evidence to support the conclusion that a claimant is not disabled, but must consider the evidence as a whole in making a reasoned disability determination." *Williams v. Colvin*, No. ED CV 14-2146-PLA, 2015 WL 4507174, at *6 (C.D. Cal. July 23, 2015) (internal citations omitted).

Specifically, while the ALJ stated Plaintiff's September 27, 2016 mental status examination was "normal," presumably based on Plaintiff's report that she "fe[lt] overtly better" and was in a "better mood," the ALJ also acknowledged that at this same visit, Plaintiff received diagnoses of recurrent major depressive disorder and general anxiety disorder. (AR 22, 976-80.) The ALJ characterized Plaintiff's August 5, 2017 examination as "normal except for the claimant having tearful/unhappy affect, low insight and somewhat circumstantial thought process." (AR 22.) A week later, after being referred to do so, Plaintiff completed psychiatry testing "due to symptoms that may be consistent with ADHD," including "problems focusing." (AR 1080, 1083.) And, following her August 25, 2017 ADHD screening evaluation, Plaintiff's medications were increased. (AR 1077.) The ALJ noted that in an August 31, 2017 examination, Plaintiff stated "she did not experience depression," but also acknowledged that in the same examination, Plaintiff discussed having difficulty focusing and was diagnosed with

ADHD. (AR 22, 1076.) Similarly, the ALJ cited Plaintiff's "normal" September 13, 2017 mental status examination, but Plaintiff's "chief complaint" for the examination was neck pain, not her mental impairments. (*Compare* AR 22 *with* AR 1067-71.) Further, while the ALJ presumably relied on Plaintiff's reported "normal mood, behavior, motor activity, and thought processes," the examination report also indicates Plaintiff "plan[ed] to follow-up with psychiatry to discuss inattention and hyperactivity symptoms." (AR 1067-68.)

The ALJ found Plaintiff's medications were "adjusted" on November 22, 2017 "due to her complaints of having problems focusing," and, indeed, the medications were increased as a result of this visit. (AR 22, 1029-30.) The ALJ noted that the following month Plaintiff reported she "fe[lt] calmer," (AR 22), even though at her December 18, 2017 examination Plaintiff also reported having continued anxiety and poor concentration. (AR 1022.) Plaintiff's increased medications were continued through Plaintiff's February 13, 2018 examination—four days after the date last insured. (AR 1014-15.) Lastly, regarding Plaintiff's March 16, 2018 examination, less than one month after the date last insured, the ALJ found Plaintiff's "[m]ental status examination was normal except for the claimant having anxious mood and fair impulse control, insight and judgment." (AR 22.) But during that examination, Plaintiff's physician diagnosed her with ADHD, major depressive disorder, and anxiety, among other things, and recommended increasing the dosage of one of her medications when her side effects were controlled, and discontinued the one medication Plaintiff did not believe she needed. (AR 1010-12.)

The above evidence does not support the ALJ's decision to disregard Dr. Allen's opinion on the grounds it was inconsistent with the "generally normal examinations." Those examinations were not "generally normal," but instead consistently identified Plaintiff's ongoing mental health symptoms, increased medication, and continued mental health diagnoses. The ALJ also did not explain how the above history reflected "conservative" treatment. Because the ALJ relied on the evidence that supported his conclusion of Plaintiff's non-disability while ignoring medical evidence in the very same reports that

undermined his determination, the ALJ's rejection of Dr. Allen's medical opinion is not supported by substantial evidence. *See Holohan*, 246 F.3d at 1207.

Second, while the ALJ stated Dr. Allen's opinion had "minimal relevance to the relevant period" because it was made "well after the date last insured," it treated the opinion as if it had no relevance at all. (AR 22-24.) This finding is not supported by substantial evidence. In support of his decision not to give any weight to Dr. Allen's opinion, the ALJ noted that "Dr. Allen began treating the claimant in May of 2021." (AR 24.) Although Dr. Allen began treating Plaintiff and provided his medical opinion in March and April of 2021—more than three years after the date last insured— "it is well-settled that medical opinions made after the period for disability are relevant to assess the claimant's disability." *See Smith v. Bowen*, 849 F.2d 1222, 1225 (9th Cir. 1988). Further, Dr. Allen specifically identified Plaintiff's mental impairment onset date as November 19, 2017. (AR 1923.) And the ALJ's treatment of Dr. Allen's opinion was inconsistent with his treatment of Dr. Johnson's review and opinion; the ALJ made no mention of Dr. Johnson's opinion being made more than two years after the date last insured. (AR 23.); *See F.B. v. Kijakazi*, No. 21-01628-JCS, 2022 WL 4544202, at *8-9 (N.D. Cal. Sept. 28, 2022) (rejecting an ALJ supporting one retrospective medical opinion, while rejecting another retrospective medical opinion that conflicted with her findings). Indeed, "where medical opinions refer back to the same chronic condition and symptoms discussed in [earlier medical records] . . . the fact that [the most recent] opinions were issued significantly after [the claimant's date last insured] does not undercut the weight those opinions are due." *Svaldi v. Berryhill*, 720 F. App'x 342, 343-44 (9th Cir. 2017) (internal citations and quotation marks omitted). Because Dr. Allen's opinion was relevant to assess Plaintiff's disability, the ALJ needed to do more than merely point to Dr. Allen's examination occurring after the date last insured. *See Smith*, 849 F.2d at 1225-26. Medical opinions and reports are "inevitably rendered retrospectively and should not be disregarded solely on that basis." *Id.* (collecting cases finding that "medical evaluations made after the expiration of a claimant's insured status are relevant to an evaluation of the pre-expiration condition").

The Commissioner's reliance on out-of-circuit district court authority is unpersuasive. (Dkt. No. 14 at 10 (citing *Garcia v. Saul*, 509 F. Supp. 3d 1306, 1313 (D.N.M. 2020); *Ross v. Berryhill*, 385 F. Supp. 3d 767, 778 (W.D. Wisc. 2019)). In the Ninth Circuit, an ALJ cannot disregard medical opinions merely because they were rendered after the date last insured. *Smith*, 849 F.2d at 1225. The cases are also distinguishable. In *Garcia*, the post-last-day-insured opinion revealed the doctor did not purport to offer a retrospective opinion and had *not* reviewed the plaintiff's medical records. *Garcia*, 509 F. Supp. 3d at 1313. Here, Dr. Allen *did* make a retrospective opinion and the ALJ made no finding as to whether Dr. Allen reviewed the medical records. In *Ross*, the doctor had not recently treated the plaintiff. *Ross*, 385 F. Supp. 3d at 778. Here, Dr. Allen's opinion was contemporaneous with his treatment of Plaintiff.

The Commissioner's opposition also raises several other reasons why the ALJ might have rejected Dr. Allen's opinion, including the length of time he treated Plaintiff and that the record did not affirmatively show Dr. Allen reviewed Plaintiff's medical records. (Dkt. No. 14 at 10.) The ALJ, however, did not give those reasons and thus they cannot be considered by this Court. *See Bray v. Commissioner of Social Security Admin.*, 554 F.3d 1219, 1225 (9th Cir. 2009) ("[l]ong-standing principles of administrative law require us to review the ALJ's decision based on the reasoning and factual findings offered by the ALJ—not post hoc rationalizations that attempt to intuit what the adjudicator may have been thinking.").

***

In sum, the ALJ's rejection of Dr. Allen's opinion is not supported by substantial evidence. *See Woods*, 32 F.4th at 792.

II. Subjective Symptom Testimony

The Ninth Circuit has "established a two-step analysis for determining the extent to which a claimant's symptom testimony must be credited." *Trevizo v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017). "First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Id.* "Second, if the claimant meets this first test

and there is no evidence of malingering, the ALJ can reject the claimant's testimony about the severity of her symptoms only by offering specific, clear and convincing reasons for doing so." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (cleaned up). If the ALJ's assessment "is supported by substantial evidence in the record, [courts] may not engage in second-guessing." *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002) (cleaned up).

Applying the two-step analysis, the ALJ first determined Plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms." (AR 20.) Because Plaintiff met step one of the test, the ALJ was required to provide "specific, clear and convincing reasons" for rejecting Plaintiff's testimony regarding the severity of her symptoms, or else find evidence of malingering. *See Lingenfelter*, 504 F.3d at 1036. The ALJ did not find evidence of malingering, but found that Plaintiff's "statements concerning the intensity, persistence and limiting effects of [her] symptoms not entirely consistent with the medical evidence and other evidence in the record." (AR 21.)

The ALJ's boilerplate conclusory rationale fails to satisfy the requirement that an ALJ provide "specific, clear and convincing reasons" supported by substantial evidence for rejecting Plaintiff's subjective symptom testimony. *See Trevizo*, 871 F.3d at 678 (finding the ALJ erred in using "boilerplate language" for the adverse credibility finding rather than offering "specific, clear and convincing reasons."); *see also Brown-Hunter v. Colvin*, 806 F.3d 487, 494 (9th Cir. 2015) (holding the ALJ erred in failing to "specifically identify any such inconsistencies" and instead stating "her non-credibility conclusion and then summariz[ing] the medical evidence supporting her RFC determination."). To ensure Plaintiff's subjective symptom testimony was "not arbitrarily discredited," the ALJ must "link [Plaintiff's] testimony to the particular parts of the record supporting [his] non-credibility determination." *Brown-Hunter*, 806 F.3d at 494.

The ALJ's rejection of Plaintiff's subjective symptom testimony based on what he described as a "course of medical treatment" that was "not consistent with disabling impairments," her "conservative treatment" through the date last insured, and a work history "not fully consistent with the claimant's allegations of disability," are not clear and convincing

reasons supported by substantial evidence. (AR 21-22.)

First, the ALJ does not indicate what "course of medical treatment" is inconsistent with disability impairments. To the extent the ALJ is relying on what he characterized as Plaintiff's "generally normal examinations," this rationale is not supported by substantial evidence as explained above.

Second, to the extent the ALJ relied upon Plaintiff's "conservative treatment," conservative medical treatment can only be used as a basis for discounting a claimant's testimony when the ALJ identifies the more aggressive treatment options that were available and appropriate, and considers the reasons the claimant did not pursue more aggressive treatment. *See Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007) ("[A]n adjudicator must not draw any inferences about an individual's symptoms and their functional effects from a failure to seek or pursue regular medical treatment without first considering any explanations that the individual may provide, or other information in the case record, that may explain infrequent or irregular medical visits or failure to seek medical treatment.") (internal citations and quotation marks omitted); *see also Cortes v. Colvin*, No. 2:15-CV-2277 (GJS), 2016 WL 1192638, at *4 (C.D. Cal. Mar. 28, 2016) ("[A]n ALJ errs in relying on conservative treatment if the record does not reflect that more aggressive treatment options are appropriate or available.") (internal citations and quotation marks omitted).

Third, the ALJ failed to explain how Plaintiff's work history undermines her subjective testimony. In his brief discussion of Plaintiff's work history, the ALJ found Plaintiff's earning history "unimpressive" and work history "not fully consistent with [Plaintiff's] allegations of disability." (AR 22, 194.) Importantly, the ALJ did not explain how Plaintiff's "unimpressive" earning history was relevant to his rejection of Plaintiff's mental impairment symptom testimony. The Commissioner argues Plaintiff's post-disability onset date income indicates Plaintiff was not as limited as she alleged because she was able to perform some work. (Dkt. No. 14 at 17.) The ALJ, however, did not clearly articulate this rationale. The Court cannot consider the Commissioner's post-hoc explanation of the ALJ's reasoning. *See Bray*, 554 F.3d at 1225. Instead, the ALJ concluded that because Plaintiff applied for a job as a

phlebotomist, she had a "subjective belief that she was capable of performing some work." (AR 21.) However, Plaintiff did not complete her phlebotomy degree despite multiple attempts to pass required phlebotomy courses. (AR 40, 245-51.) Additionally, the ALJ ignored Plaintiff's hearing testimony, where she stated she was unable to work due to intermittent pain, depression, and anxiety attacks. (AR 42-43.)

In sum, the ALJ's rejection of Plaintiff's subjective symptom testimony does not satisfy the "demanding" clear and convincing standard. *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014).

III. Vocational Expert Testimony

Because the ALJ's determination of Plaintiff's RFC is not supported by substantial evidence, the Court need not consider Plaintiff's additional argument regarding the ALJ's step-five analysis. Particularly, the Court need not address Plaintiff's vocal expert testimony arguments because the Court's order for further proceedings will result in new testimony.

IV. Harmless Error

Because the ALJ's consideration of the medical evidence and subjective symptom testimony is not supported by substantial evidence, the ALJ's decision cannot stand. The ALJ's errors here go to the heart of the disability determination and are not harmless. "[A] reviewing court cannot consider the error harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination." *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006). Had the ALJ not erred in evaluating the medical opinion evidence and rejecting Plaintiff's subjective symptom testimony, the ALJ could have reasonably come to a different conclusion regarding Plaintiff's RFC. *See id.*

V. Remand

Plaintiff asks the Court to remand the case for the payment of benefits or alternatively, for further proceedings. (Dkt. No. 13-1 at 29.) When reversing an ALJ's decision, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004). Remand for an award of benefits is proper, however, "where (1) the record has been fully developed and further

administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand." *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017) (internal citation and quotation marks omitted).

Here, prong one is not satisfied because the record has not been fully developed. Because the ALJ erred in discounting Dr. Allen's opinion and rejecting Plaintiff's subjective symptom testimony to determine her RFC, there are outstanding issues that must be resolved before a final determination can be made. Prong two has been satisfied because as discussed above, the ALJ gave legally insufficient reasons for discounting Dr. Allen's opinion and Plaintiff's subjective symptom testimony. The third prong is not satisfied because it is not clear from the record that the ALJ would be required to find Plaintiff disabled if medical opinions were properly evaluated and Plaintiff's symptom testimony was properly credited. For instance, to determine Plaintiff's disability status, the ALJ should reconcile conflicting medical opinions, such as Dr. Allen's and Dr. Johnson's, and other evidence in the record finding Plaintiff's impairments could be addressed through work-related limitations. Because the three elements are not met, further proceedings are warranted.

CONCLUSION

For the reasons stated above, I recommend the Court GRANT Plaintiff's motion, DENY Defendant's cross-motion, and REMAND for further proceedings. Further, I recommend denying Plaintiff's request for remand to a different ALJ because Plaintiff has not provided "evidence of bias, substantial delay, or other reason for disqualification." *See M.P. v. Kijakazi*, No. 21-CV-03632-SVK, 2022 WL 1288986, at *9 (N.D. Cal. Apr. 29, 2022); *see also Rollins v. Massanari*, 261 F.3d 853, 857-58 (9th Cir. 2001) (noting that "ALJs and other similar quasi-judicial administrative officers are presumed to be unbiased" and "this presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification."). Plaintiff has

not shown that the ALJ's behavior, in the context of the entire case, was "so extreme as to display clear inability to render fair judgment." *Rollins*, 261 F.3d at 858 (citing *Liteky v. United States*, 510 U.S. 540, 551 (1994)).

Applicant Details

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Date of BA/BS	**May 2020**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 25, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Journal on Legislation**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 11, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510-1915 United States

Dear Judge Walker:

I am writing to express my interest in a clerkship in your chambers for the 2024 term. I am a recent graduate of Harvard Law School with a background in computer engineering. After my experiences as an intern at the U.S. Attorney's Office for the Southern District of New York and as a technical editor for the *Harvard Journal on Legislation*, I am eager to use my legal research and writing skills to support the work of your chambers. I am particularly interested in clerking for you given your extensive litigation experience and time as an Assistant U.S. Attorney, as I am planning to pursue a career in public service as a government litigator. Additionally, I have several close family members stationed at Naval Station Norfolk, I would love the opportunity to move closer to them.

In addition to my work with the U.S. Attorney's Office for the Southern District of New York, where I researched and drafted pre-trial motions and appellate briefs, I had the opportunity to intern for Judge Patti B. Saris on the U.S. District Court for the District of Massachusetts last year. I thoroughly enjoyed researching new legal issues, drafting opinions, writing bench memoranda, and collaborating with the clerks in chambers. Through these experiences and others, I am strengthening and refining the skills necessary to be a law clerk.

Please find enclosed my resume, law school and undergraduate transcripts, and writing sample. The following individuals will submit letters of recommendation separately:

Anna Lvovsky
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Hon. Patti B. Saris
U.S. District Court
District of Massachusetts
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I would welcome any opportunity to interview with you. Thank you for your consideration.

Sincerely,

Samantha Paralikas

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EDUCATION

HARVARD LAW SCHOOL, Cambridge, MA
J.D., *cum laude*, May 2023
Awards: Dean's Scholar Prize in Evidence
Activities: *Harvard Journal on Legislation*, Technical Editor
Women's Law Association, Event Coordinator and Communications Director
Legal Research Assistant, Professor Rebecca S. Goldstein, Asst. Prof. of Law at U.C. Berkley

GEORGE WASHINGTON UNIVERSITY, Washington, DC
B.S., *summa cum laude* in Computer Engineering, May 2020
Honors: Benjamin C. Cruickshanks Award (highest academic standing in Computer Engineering)
Derrill C. Rohlfs Senior Design Award (best senior project in Computer Engineering)
Activities: GW Mock Trial Team, Treasurer and Team Captain
GW Student Association, Vice President of Judicial and Legislative Affairs

EXPERIENCE

Cravath, Swaine & Moore LLP, New York, NY Summer 2022
Summer Associate
Prepared legal memoranda addressing antitrust standing. Researched and drafted motion for a new trial based on improper expert testimony and inaccurate damages calculation in contract dispute case. Reviewed discovery documents and recommended strategy for deposition of opposing party's executive. Wrote brief for pro bono case requesting resentencing pursuant to a change in N.Y.S. sentencing law for victims of domestic violence.

Hon. Patti B. Saris, U.S. District Court, District of Massachusetts, Boston, MA Spring 2022
Judicial Intern
Researched and wrote bench memoranda on issues concerning patent law, Article III standing, and abstention of jurisdiction. Drafted order addressing ex parte communications in Rule 23 class action. Observed trials, sentencing hearings, *Markman* hearings, pretrial conferences, and other proceedings.

U.S. Attorney's Office for the Southern District of New York, New York, NY Summer 2021
Criminal Division Intern
Drafted appellate brief for 2nd Circuit in response to sentence reduction claim. Researched and wrote legal memoranda for evidentiary issues and Privacy Act requirements. Composed draft government briefs responding to *habeas corpus* petition in organized crime case and motion to dismiss in domestic terrorism case. Observed trials, sentencing hearings, and other court proceedings.

National Aeronautics and Space Administration (NASA), Washington, D.C. Summer 2019
Intern, James Webb Space Telescope Program
Developed report analyzing the failure trends in large-scale program development at NASA, relying on Inspector General investigations, instrument failure reports, and interviews with program managers.

PERSONAL

Volunteer high school mock trial coach, long-distance running, drawing, painting, and fashion design.

Harvard Law School

Date of Issue: May 26, 2023
Not valid unless signed and sealed
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Record of: Samantha A Paralikas
Current Program Status: Graduated
Degree Received: Juris Doctor May 25, 2023 Cum Laude
Pro Bono Requirement Complete

JD Program

Fall 2020 Term: September 01 - December 31

1000	Civil Procedure 1 Rubenstein, William	H	4
1001	Contracts 1 Okediji, Ruth	P	4
1006	First Year Legal Research and Writing 1A Bronsther, Jacob	P	2
1003	Legislation and Regulation 1 Tarullo, Daniel	P	4
1004	Property 1 Kelly, Daniel	H	4

Fall 2020 Total Credits: 18

Winter 2021 Term: January 01 - January 22

1055	Introduction to Trial Advocacy Sullivan, Ronald	CR	2

Winter 2021 Total Credits: 2

Spring 2021 Term: January 25 - May 14

1024	Constitutional Law 1 Fallon, Richard	P	4
1002	Criminal Law 1 Yang, Crystal	H	4
1006	First Year Legal Research and Writing 1A Bronsther, Jacob	H	2
2296	International Humanitarian Law/Law of Armed Conflict Modirzadeh, Naz	P	3
1005	Torts 1 Gersen, Jacob	P	4

Spring 2021 Total Credits: 17
Total 2020-2021 Credits: 37

Fall 2021 Term: September 01 - December 03

2035	Constitutional Law: First Amendment Weinrib, Laura	H	4
2897	Contemporary Issues in Constitutional Law Liu, Goodwin	H	2
2079	Evidence Lvovsky, Anna	H*	4

* Dean's Scholar Prize

2934	Patent Trial Advocacy Tompros, Louis	H	3

Fall 2021 Total Credits: 13

Winter 2022 Term: January 04 - January 21

2050	Criminal Procedure: Investigations Seo, Sarah	H	3

Winter 2022 Total Credits: 3

Spring 2022 Term: February 01 - May 13

2000	Administrative Law Beermann, Jack	P	3
8022	Judicial Process in Trial Courts Clinic Cratsley, John	H	4
2139	Judicial Process in Trial Courts Clinical Seminar Cratsley, John	H	2
2918	Mass Incarceration and Sentencing Law Gertner, Nancy	H	3

Spring 2022 Total Credits: 12
Total 2021-2022 Credits: 28

Fall 2022 Term: September 01 - December 31

2048	Corporations Catan, Emiliano	H	4
7000W	Independent Writing Goldstein, Rebecca	H	1
2156	Non-profit Organizations and Law Minow, Martha	P	2
2226	Sex Equality MacKinnon, Catharine	P	3
2234	Taxation Abrams, Howard	P	4

Fall 2022 Total Credits: 14

Winter 2023 Term: January 01 - January 31

2169	Legal Profession: Government Ethics - Scandal and Reform Rizzi, Robert	P	3

Winter 2023 Total Credits: 3

continued on next page

Harvard Law School

Record of: Samantha A Paralikas

Date of Issue: May 26, 2023
Not valid unless signed and sealed

Spring 2023 Term: February 01 - May 31

3073	Access to Justice in the Digital World Plunkett, Leah	CR	1
2366	Complex Litigation: Legal Doctrines, Real World Practice Clary, Richard	H	2
2086	Federal Courts and the Federal System Fallon, Richard	H	5
3213	The Law of Presidential Elections Schwartztol, Larry	H	2

Spring 2023 Total Credits: 10
Total 2022-2023 Credits: 27
Total JD Program Credits: 92

End of official record

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.
~~~~~~

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~~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems
Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Official Academic Transcript from:
THE GEORGE WASHINGTON UNIVERSITY
OFFICE OF THE REGISTRAR
800 21ST STREET NW
WASHINGTON, DC 20052

TELEPHONE: 202-994-4900

Official Academic Transcript of:
SAMANTHA A PARALIKAS
Transcript Created: 21-Jul-2021

Requested by:
SAMANTHA A PARALIKAS
22 KIRKWOOD DRIVE
GLEN COVE, NY 11542-1612

E-Mail: sparalikas@gwu.edu

Document Type: THIRD-PARTY SECURE PDF

Intended Recipient:
SAMANTHA PARALIKAS
22 KIRKWOOD DRIVE
GLEN COVE, NY 11542-1612

E-Mail: sparalikas@gwu.edu

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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G27902165
Date of Birth: 28-AUG

Date Issued: 21-JUL-2021

Record of: Samantha A Paralikas

Page: 1

Student Level: Undergraduate
Admit Term: Fall 2016

Issued To: SAMANTHA PARALIKAS
22 KIRKWOOD DRIVE
GLEN COVE, NY 11542-1612

REFNUM:56186787

Current College(s):School of Engin & App Sc
Current Major(s): Computer Engineering

Degree Awarded: Bachelor of Science 17-MAY-2020
summa cum laude
Major: Computer Engineering

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
NON-GW HISTORY:				
2014-2016	Advanced Placement Exam Credit			
ENGL 1050	Intro To Literary Studies	3.00	TR	
HIST 1120	European Civ In World Context	3.00	TR	
HIST 1310	Intro To American History	3.00	TR	
HIST 1311	Intro To American History	3.00	TR	
MATH 1231	Single-Variable Calculus I	3.00	TR	
PSC 1002	Intro-American Politics & Govt	3.00	TR	
	Transfer Hrs: 18.00			
	Total Transfer Hrs: 18.00			
GEORGE WASHINGTON UNIVERSITY CREDIT:				
Fall 2016				
	School of Engin & App Sc			
	Computer Engineering			
CHEM 1111	General Chemistry I	4.00	B	12.00
ECE 1010	Intro Electric/Cmputer Engr I	1.00	A	4.00
MATH 1232	Single-Variable Calculus II	3.00	A	12.00
PSC 1003	Intro-International Politics	3.00	A	12.00
SEAS 1001	Engineering Orientation	1.00	A	4.00
UW 1020	University Writing	4.00	A	16.00
	Ehrs 16.00 GPA-Hrs 16.00 Pts 60.00 GPA 3.75			
	CUM 16.00 GPA-Hrs 16.00 Pts 60.00 GPA 3.75			
	Good Standing			
	Dean's List			
Spring 2017				
	School of Engin & App Sc			
	Computer Engineering			
CSCI 1311	Discrete Structures I	3.00	A	12.00
ECE 1020	Intro Electric/Cmputer Engr II	1.00	A	4.00
ECE 1120	C Programming For Ece	3.00	A-	11.10
GEOG 1001	Intro To Human Geography	3.00	B	9.00
MATH 2233	Multivariable Calculus	3.00	A-	11.10
PHYS 1021	University Physics I	4.00	A-	14.80
	Ehrs 17.00 GPA-Hrs 17.00 Pts 62.00 GPA 3.65			
	CUM 33.00 GPA-Hrs 33.00 Pts 122.00 GPA 3.70			
	Good Standing			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
Fall 2017				
APSC 2113	Engineering Analysis I	3.00	B+	9.90
ECE 1125	Data Structures&Algorithms Ece	3.00	A	12.00
ECE 2110	Circuit Theory	4.00	A	16.00
ECE 2120	Engineering Seminar	1.00	A	4.00
LSPA 1055	Barre	1.00	P	0.00
PHYS 1022	University Physics II	4.00	A-	14.80
	Ehrs 16.00 GPA-Hrs 15.00 Pts 56.70 GPA 3.78			
	CUM 49.00 GPA-Hrs 48.00 Pts 178.70 GPA 3.72			
	Good Standing			
	Dean's List			
Spring 2018				
APSC 3115	Engineering Analysis III	3.00	A	12.00
ECE 2115	Engineering Electronics	4.00	A	16.00
ECE 2140	Design Of Logic Systems I	4.00	A	16.00
ECE 2210	Circuits, Signals And Systems	3.00	A	12.00
LSPA 1055	Barre	1.00	P	0.00
SEAS 4800	Nanotechnology Devices	1.00	A	4.00
	Ehrs 16.00 GPA-Hrs 15.00 Pts 60.00 GPA 4.00			
	CUM 65.00 GPA-Hrs 63.00 Pts 238.70 GPA 3.79			
	Good Standing			
	Dean's List			
Fall 2018				
CSCI 3411	Operating Systems	4.00	B	12.00
ECE 3130	Digital Electronics And Design	4.00	A	16.00
ECE 3220	Intro Digital Signal Process	3.00	A	12.00
ECE 3515	Computer Organization	3.00	A-	11.10
ECE 3520	Microprocessors:Softw are/Hardw	3.00	B+	9.90
	Ehrs 17.00 GPA-Hrs 17.00 Pts 61.00 GPA 3.59			
	CUM 82.00 GPA-Hrs 80.00 Pts 299.70 GPA 3.75			
	Good Standing			

********** CONTINUED ON PAGE 2 **********

University Registrar

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G27902165
Date of Birth: 28-AUG

Date Issued: 21-JUL-2021

Record of: Samantha A Paralikas

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
Spring 2019				
ECE 3135	Design Of Logic Systems II	4.00	A	16.00
ECE 3310	Intro To Electromagnetics	3.00	A	12.00
ECE 3525	Intro To Embedded Systems	3.00	A	12.00
ECE 3915W	Ece Capstone Project Lab I	1.00	A	4.00
ECE 4415	Intro To Computer Networks	3.00	A-	11.10
ECE 4425	Data Communications Lab	1.00	A	4.00
Ehrs 15.00 GPA-Hrs 15.00 Pts 59.10 GPA 3.94				
CUM 97.00 GPA-Hrs 95.00 Pts 358.80 GPA 3.78				
Good Standing				
Dean's List				
Fall 2019				
ECE 4140	Vlsi Design And Simulation	3.00	A	12.00
ECE 4535	Computer Architecture Design	3.00	A	12.00
ECE 4620	Electrical Power Systems	3.00	A	12.00
ECE 4920W	Ece Capstone Project Lab II	3.00	A	12.00
Ehrs 12.00 GPA-Hrs 12.00 Pts 48.00 GPA 4.00				
CUM 109.00 GPA-Hrs 107.00 Pts 406.80 GPA 3.80				
Good Standing				
Dean's List				
Spring 2020				
ECE 4150	Asic/Design/Testing Vlsi	3.00	A	12.00
ECE 4925W	Ece Capstone Project Lab III	3.00	A	12.00
EMSE 6005	Organization Behavior For Em	3.00	A	12.00
PHIL 2135	Ethics: Business & Professions	3.00	A	12.00
STAT 4157	Intro-Mathematical Statistics	3.00	A	12.00
Ehrs 15.00 GPA-Hrs 15.00 Pts 60.00 GPA 4.00				
CUM 124.00 GPA-Hrs 122.00 Pts 466.80 GPA 3.83				
Good Standing				
Dean's List				
...				
DURING THE SPRING 2020 SEMESTER, A GLOBAL PANDEMIC CAUSED BY COVID-19 RESULTED IN SIGNIFICANT ACADEMIC DISRUPTION.				

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	124.00	122.00	466.80	3.83
TOTAL NON-GW HOURS	18.00	0.00	0.00	0.00
OVERALL	142.00	122.00	466.80	3.83

########## END OF DOCUMENT ##########

University Registrar

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Washington, DC 20052

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DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
		NVCC	Northern Virginia Community College
CU	Catholic University of America	PGCC	Prince George's Community College
GC	Gallaudet University	SEU	Southeastern University
GU	Georgetown University	TC	Trinity Washington University
GL	Georgetown Law Center	USU	Uniformed Services University of the Health Sciences
GMU	George Mason University		
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added*: A-, B+, B-, C+, C-, D+, D-.*
Effective Summer 1980: The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System

H, Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit http://www.gwu.edu/transcriptkey

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Samantha Paralikas for a clerkship in your chambers. Samantha was a standout student in my fall 2021 Patent Trial Advocacy course. The course—an eighteen-student simulation class—allows upper level students to act as trial counsel in a patent case, including delivering claim construction arguments, taking and defending depositions, writing motions, and presenting argument at trial. As part of the course, Samantha presented a patent claim construction argument before the Honorable Raymond Chen of the United States Court of Appeals for the Federal Circuit, took and defended a deposition, wrote a motion in limine, and delivered the plaintiff's-side closing argument in our end-of-term mock jury trial.

Samantha's performance in my course was outstanding, and she has the potential to be a superstar litigator. In particular, her claim construction argument was among the best I have seen in the five years I have taught this course. She was exceptionally well prepared, she paired an impressive technical understanding of the patent with fluidity in the law and tactics of patent claim construction, and she was flexible and dynamic in responding to questions. In fact, Judge Chen—quite rightly—singled her argument out as an example of impressive oral advocacy in his comments to the full class.

Her written work was likewise top notch. She prepared a crisply written and—equally importantly—strategically and legally sound motion in limine in the pretrial phase of the course. What impressed me most about it was that she envisioned the principle for the motion early in the case, obtained the critical admissions for it during the deposition phase, then leveraged those concessions in a compelling brief.

Finally, Samantha is a dynamic and committed leader. My course divides students early into nine-person teams. Samantha was the undisputed de facto captain of the plaintiff's team—she not only deposed a key witness and delivered an outstanding closing argument, but also guided her team's strategy and provided feedback for her teammates on their work, including real-time suggestions and arguments during trial. Her leadership was all the more impressive because she was a 2L at the time of the course (whereas the overwhelming majority of students were 3Ls or graduate students).

I would of course be happy to discuss Samantha with you further if it would help.

Very truly yours,

Louis W. Tompros
Lecturer on Law, Harvard Law School
Partner, Wilmer Cutler Pickering Hale and Dorr LLP

Louis Tompros - ltompros@law.harvard.edu - 1 617 526 6886

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to highly recommend Samantha Paralikas for a clerkship in your chambers.
She was an intern in my chambers during the winter of 2022.

Samantha was an excellent writer, researcher, and thinker. She was also extremely articulate in presenting her viewpoint. She wrote an outstanding bench memorandum on a motion to dismiss § 1983 claims of excessive force on inmates by guards in a prison; and a thorough research memorandum addressing whether plaintiffs could contact members of a collective action. She also prepared a section of an opinion for a Markman hearing involving complex patent issues.

Samantha shared a passion for criminal justice and was eager to talk about sentencing policy and compassionate release. Her views were well-reasoned and thoughtful.

Samantha worked well with the law clerks, and my administrative staff. Her work ethic was impressive. She is the type of clerk I would hire for my own session. Please call me if there are any questions. My cell is 617-595-2532.

Very truly yours,

Patti B. Saris

Patti Saris - Honorable_Patti_Saris@mad.uscourts.gov

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I'm thrilled to write on behalf of Samantha Paralikas as she applies for a clerkship in your chambers. Samantha was a star student in my Evidence course in the fall of 2021, not only in class but also as a valuable contributor to my weekly open office hours. Based on Samantha's masterful performance in the course, the diligence and work ethic demonstrated in our review sessions, and her unfailing thoughtfulness and graciousness toward her peers, I have no doubt that she will be a terrific law clerk and a valuable addition to any chambers.

I first met Samantha when she enrolled in my Evidence course in September 2021. I run my Evidence class in a highly Socratic manner, calling on half of a 90-person class each session and frequently soliciting volunteers on broader policy questions. Altogether, I had a chance to hear from Samantha nearly two dozen times. Samantha was a masterful interlocutor in all our exchanges, equally prepared to explain a dense legal opinion, to assess the broader institutional legacies of seemingly narrow rules, or to think quickly on her feet about rapidly shifting sets of facts. She often had well-developed opinions about the quality or the justice of a particular opinion, and she did not hesitate to articulate those views when asked. But she was always eager to learn and to consider new perspectives, always willing to try her hand at articulating the best counterarguments against her preferred position or to defend an unpopular argument for the sake of the broader conversation.

Samantha demonstrated a similar diligence, open-mindedness, and eagerness to learn in our many conversations in office hours. Samantha quickly emerged as a regular fixture at my weekly office hour sessions, dropping by both to ask her own questions and to learn from others' comments. Her own questions were always characteristically astute, whether homing in on particularly thorny doctrinal wrinkles or speculating about how a particular rule might apply in novel circumstances. She was also always deeply considerate toward other students, carefully listening to their questions even when I suspected she knew the answer and making sure new arrivals had a chance to participate. On multiple occasions, Samantha's mastery of the doctrine and attentiveness to others improved the learning process for all involved, allowing her to gently jump in and ask thoughtful follow-up questions when she suspected a potential miscommunication or when other students still seemed uncertain about the doctrine.

Based on these experiences, I was thrilled to see Samantha's final grade on the exam. She earned a Dean's Scholar Prize, reserved for the very top handful of exams. She earned that grade both through her exceptional responses to seven issue-spotters and through a deeply thoughtful longer essay. When it comes to the short-answer section—candidly, the most important part of the exam—noting her Dean's Scholar Prize might actually undersell the quality of Samantha's answers. Samantha tied with another immensely impressive exam for the very top score in the entire class, a distinction achieved through a series of extraordinarily comprehensive, detailed, and consistent responses to a series of dauntingly difficult questions. Working in a tight time window, Samantha managed to essentially produce seven short essays, seizing on the many evidentiary rules implicated in each scenario and surveying a wealth of arguments and counterarguments regarding how those rules should apply on the facts. Not least, she managed to do so while maintaining the quality of her writing and the clarity of her organization. Samantha's ability to produce such a volume of high-quality analysis under such high-pressure conditions speaks clearly to her capacity as a legal thinker and writer.

Although Samantha made the (smart) strategic choice to allot most of her time to the issue-spotters, her longer essay was also deeply thoughtful. The prompt proposed a new amendment to the Federal Rules of Evidence allowing for the admission of "substantially necessary" defense-side evidence, pushing students to consider both the institutional imbalance between prosecutors and criminal defendants and the proper role of judges in mediating that imbalance. Samantha began by acknowledging the practical benefits of the proposal, from overriding existing rules that restrict useful defensive evidence, such as character evidence about third parties, to balancing out rules that tilt the scales toward the prosecution. But she cautioned against putting too much hope in the amendment, noting not only its countervailing costs in terms of predictability, efficiency, and even accuracy, but also the likelihood that the same institutional constraints that already often discourage judges from invoking discretionary rules in a defendant's favor would also limit the power of this new addition. Drawing on a variety of cases and readings to illustrate her point, the essay demonstrated both Samantha's deep knowledge of the law and her impressive attention to the deeper institutional dynamics that shape how trial judges approach their practical work in the courtroom.

For all these reasons, I am delighted to give Samantha my strongest support. She is an immensely talented doctrinal thinker, an insightful and meticulous analyst of legal institutions, a diligent and dedicated student, and a gracious colleague. She will be a terrific law clerk, and will enrich the intellectual life of any chambers.

Sincerely,

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WRITING SAMPLE

Drafted Spring 2022

I have permission from Judge Saris to use this memorandum as a writing sample. It was lightly edited in response to feedback and all underlying facts of the case, relevant dates and places, and names of parties have been changed.

This bench memorandum was written to summarize the parties' arguments and legal issues prior to a motion to dismiss hearing. Ultimately, Judge Saris denied the motion to partially dismiss.

MEMORANDUM

To: Judge Patti Saris
From: Samantha Paralikas
Case: Anderson and Miller v. Perry et al.
Re: Defendant's Motion to Partially Dismiss Complaint [Dkt. 53]

INTRODUCTION

Plaintiffs Ryan Anderson ("Anderson") and Joseph Miller ("Miller") (collectively, "Plaintiffs") filed a complaint on August 10, 2021, against Defendants Courtney Perry ("Perry"), James Walker ("Walker"), Alexander Frost ("Frost"), and several other government officials (collectively, "Defendants") alleging violations of substantive constitutional rights pursuant to 42 U.S.C. § 1983, and violations of state laws. [Dkt. 1, ¶¶ 254-370].

Defendants have moved to partially dismiss the complaint against them under two theories. [Dkt. 54]. They argue that (1) Counts IV and V should be dismissed against Defendant Perry as Plaintiff Miller is already pursing a certiorari claim in the Superior Court and Plaintiff Anderson's claims, construed as certiorari claims, are untimely, and (2) Count V should be dismissed against Defendant Walker given that Plaintiffs do not have standing to sue. [Dkt. 54]. For the reasons discussed below, I recommend that the Court DENY Defendants' motion to dismiss on all accounts.

BACKGROUND

The following facts are drawn from Plaintiff's Complaint ("the Complaint") [Dkt. 1] as well as documents the authenticity of which are not disputed by the parties, official records, documents central to Plaintiffs' claims, and documents sufficiently referenced in the Complaint. *See Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993).

I. Factual Background

Plaintiffs Anderson and Miller are currently incarcerated at Johnson Correctional Center ("JCC") and have resided there during all times relevant to this case. [Dkt. 1, ¶¶ 5-6]. On March

20, 2020, a riot broke out between several inmates and correction officers, resulting in the injury of several officers. [Dkt. 1, ¶¶47-49]. JCC administrators subsequently retailed against the other inmates by working with quasi-paramilitary squads from the Department of Corrections ("DOC") to show the prisoners who was "in charge" of JCC. [Dkt. 1, ¶¶ 56-76]. On March 30, 2020, Plaintiffs were both placed in Cell 15, which is well-known to be largely outside the view of the facility's surveillance cameras. [Dkt. 1, ¶¶ 87-88]. The deputy commissioner of JCC ordered a group of at least six armed officers wearing paramilitary gear to violently enter Plaintiffs' cell. [Dkt. 1, ¶¶ 96-101]. The officers restrained Plaintiffs, assaulted them, and slammed them against the floor and the mental doorway. [Dkt. 1, ¶¶ 102-113]. After Miller was taken out of the cell by two officers, Defendant Frost ordered his guard dog to attack Miller. [Dkt. 1, ¶¶ 115-20].

Anderson was denied any medical treatment following the assault. [Dkt. 1, ¶ 112]. Miller, on the other hand, was taken to JCC Health Services Unit and then transported to a nearby hospital for further treatment. [Dkt. 1, ¶¶ 124-25]. At the hospital, Miller informed hospital staff that was he was unjustifiably attacked by DOC staff and their attack dog. [Dkt. 1, ¶ 126]. One of the officers escorting Miller, Defendant Walker, overheard Miller's statements and proceeded to falsely tell hospital staff that Miller had kicked the attack dog and was involved in an assault on correctional officers at JCC. [Dkt. 1, ¶ 126]. Walker's false statement that Miller attempted to kick the attack dog was recorded in Miller's medical records and later used against him in a disciplinary proceeding. [Dkt. 1, ¶¶ 126, 244-45, 323].

On April 4, 2020, Plaintiffs each filed a grievance complaining of the unwarranted and excessive force used against each of them. [Dkt. 1, ¶¶ 143-44]. In response, Defendant Frost wrote a false report on April 28, 2020, accusing Miller of fifteen disciplinary offenses, including

aggravated assault of officers during Defendants' intrusion into Cell 15. [Dkt. 1, ¶¶ 223-24]. Similarly, Anderson received a disciplinary report for offenses including aggravated assault of an officer after filing his grievance. [Dkt. 1, ¶¶ 145-47].

II. Miller's Disciplinary Hearing

As a result of the disciplinary report filed against Miller, a hearing was held before Hearing Officer Defendant Perry on September 22, 2020. [Dkt. 1, ¶¶223]. Perry suppressed exculpatory evidence and denied Miller's request for discovery of relevant evidence for his defense. [Dkt. 1, ¶¶224-26]. She also credited only the correctional officers' testimony despite video recordings establishing some of their statements as false. [Dkt. 1, ¶¶235, 242–243, 246]. For example, she found Miller guilty of "attempting to assault an animal," despite Perry reviewing the video recording in evidence clearly showing that the officers' claims that Miller broke free and attempted to kick the dog are not true. [Dkt.1, ¶¶239-41]. Perry relied on the Defendant Walker's statements to hospital staff included in Miller's medical report and found them to be "factual." [Dkt. 1, ¶244]. Perry found Miller guilty and sentenced him to thirteen months in solitary confinement. [Dkt. 1, ¶¶247, 299]. On March 28, 2021, Miller filed a complaint for certiorari review in state court. [Dkt. 54-2].

III. Anderson's Disciplinary Hearing

Anderson was accused of committing several serious offenses, including aggravated assault of an officer. [Dkt. 1, ¶196]. On August 24, 2020, Perry held a hearing on the disciplinary report. [Dkt. 1, ¶¶199-201]. Perry suppressed exculpatory evidence, denied Anderson's request to discover relevant evidence, and ignored uncontradicted forensic evidence proving officers had lied in the disciplinary report. [Dkt. 1, ¶¶201-02, 204-05]. Perry found Anderson guilty of

assaulting a correction officer and placed him in solitary confinement for ten months. [Dkt.1, ¶194].

IV. The Complaint

On August 10, 2021, Plaintiffs filed the Complaint against Defendants asserting ten counts violating various federal and state laws. [Dkt. 1]. At issue here, Plaintiffs assert two claims pursuant to 42 U.S.C. § 1983: retaliation for exercising First Amendment rights in violation of the First Amendment (Count IV), and conspiracy to interfere with civil rights (Count V). [Dkt. 1, ¶¶254-325].

LEGAL STANDARD

In analyzing whether a complaint states a claim under Rule 12(b)(6), the Court sets aside conclusory statements and examines only the pleader's factual allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Courts are not "obliged . . . to credit bald assertions [or] unsubstantiated conclusions." *United States v. AVX Corp.*, 962 F.2d 108, 115 (1st Cir. 1992) (citation omitted). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678.

DISCUSSION

I. Defendants' Motion to Dismiss Counts IV and V against Perry Should be Denied.

A. Plaintiff Anderson Claims are Likely Not Subject to the 60-Day Statute of Limitation for Certiorari Actions.

a. Parties' Arguments

The Defendants claim that Counts IV and V are actions in certiorari because "[i]nmates challenging alleged improprieties in prison disciplinary proceedings under Massachusetts law

must proceed by way of action in the nature of certiorari pursuant to [Massachusetts General Laws c.] 249, section 4 [("Chapter 249")]." *Martin v. Clavin*, 2010 WL 3607079 (D. Mass. Sept. 9, 2010) (citations omitted)). Based on this premise, the Defendants assert that Anderson's claims, which he did not file within the statute of limitations for certiorari claims, are time-barred and should be dismissed. [Dkt. 54, at 8-9].

Plaintiffs disagree that Counts IV and V exclusively lie in the nature of certiorari, governed by Chapter 249. [Dkt. 58, at 7]. While Plaintiffs acknowledge that "improprieties in prison disciplinary proceedings under State law must proceed by way of action in the nature of certiorari," they argue that violations of constitutional rights fall outside the scope of a certiorari complaint. [Dkt. 58, at 8] (quoting *Pidge v. Superintendent, MCI-Cedar Junction*, 584 N.E. 2d 1145, 1148 (Mass. App. Ct. 1992)). Therefore, Anderson's claims are not time barred as they are "subject only to the 3-year statute of limitations applicable to Section 1983 actions." [Dkt. 58, at 11] (citing *Pidge*, 584 N.E.2d at 1148-49).

b. Analysis

Defendants' motion to dismiss Anderson's claims against Perry should be denied as Anderson's claims are within the three-year statute of limitations for §1983 claims. Defendants are correct that challenges to "improprieties in prison disciplinary proceedings under State law must proceed by way of an action in the nature of certiorari." *Pidge*, 584 N.E.2d at 1148; *see also Martin*, 2010 WL 3607079, at *8 (D. Mass Sept. 9, 2020) (citing *Murphy v. Superintendent, Mass. Correctional Inst., Cedar Junction*, 396 Mass. 830, 489 N.E.2d 661, 663 (Mass. 1986) (finding inmates' claim as an action in the nature of certiorari "even though the complaint speaks in terms of an action for declaratory and injunctive relief")); *Shabazz v. Cole*, 69 F.Supp.2d 177, 190 (D. Mass. 1999). "A civil action in the nature of certiorari under [Chapter 249)], is 'to relieve aggrieved parties from the injustice arising from errors of law committed in proceedings

affecting their justiciable rights when no other means of relief are open.'" *Seales v. Boston Housing Auth.*, 40 N.E.3d 1046, 1050–51 (Mass. App. Ct. 2015) (quoting *Figgs v. Boston Hous. Authy.*, 14 N.E.3d 229, 235 (Mass. 2014) (citations omitted)). "The 60 day statute of limitations under ch. 249, § 4 begins to run when the last administrative action takes place." *See Committee for Public Counsel Services v. Lookner*, 47 Mass. App. Ct. 833, 716 N.E.2d 690, 693 (Mass. App. Ct. 1999). Failure to file a certiorari claim within 60 days is such a "serious misstep" that the action must be dismissed. *Pidge*, 584 N.E.2d at 1148.

However, this does not mean that all claims relating to prison disciplinary proceedings are governed by Chapter 249. For example, § 1983 claims are not subject to the same statute of limitations. "The Supreme Court directs federal courts adjudicating civil rights claims under 42 U.S.C. § 1983 to borrow the statute of limitations applicable to personal injury actions under the law of the forum state." *Street v. Vose*, 936 F.2d 38, 39 (1st Cir. 1991) (citing *Wilson v. Garcia*, 471 U.S. 261 (1985)). In the event a state has more than one statute of limitations that applies to personal injury actions, a court should use the state's general personal injury statute of limitations. *Id.* (citing *Owens v. Okure*, 488 U.S. 235, 249-250 (1989). In Massachusetts, that statute is M.G.L. c. 260 § 2A, which imposes a three-year statute of limitations. *Id.*

In *Duffy v. Massachusetts Department of Correction*, the defendant argued that all of the plaintiff's claims arising out an allegedly improper disciplinary hearing were time-barred by Chapter 249 even though the plaintiff raised the claims under § 1983. 746 F. Supp. 232, 233–234 (D. Mass. 1990) (Young, J.). The court rejected this argument as "frivolous" and found that the plaintiff's claim was well within Massachusetts's three-year statute of limitation, which governs § 1983 actions. *Id.* at 244.

Even when the plaintiff has asserted explicitly in her complaint both § 1983 and certiorari claims arising out of the same event, courts have allowed the federal claims to proceed even if the state claim was time barred. *See, e.g.*, *Pidge*, 584 N.E.2d at 1148–49 (reversing dismissal of § 1983 claims for damages and injunctive relief related to handling of disciplinary case); *Shabazz*, 69 F.Supp.2d at 190 n.7 (distinguishing inmates' § 1983 civil rights claims alleging violations of substantive constitutional rights from counts sounding in certiorari); *McLeod v. Dukakis*, 1990 WL 180708, at *1–2 (D. Mass. Nov. 2, 1990) (Skinner, J.) (citing *Patsy v. Board of Regents,* 45 U.S. 496, 500–501 (1982)) (holding plaintiff properly filed within three years and was not barred by statute of limitations in Chapter 249). The court in *Pidge* affirmed the trial court's dismissal of the plaintiffs' claim arising out of an improper disciplinary proceeding insofar as it was constituted as a certiorari claim. *Pidge*, 584 N.E.2d at 1148-49. However, the court reversed the trial court's dismissal of the claims brought under § 1983 since the plaintiff was still within the applicable three-year statute of limitation. *Id.*

Here, Defendants argue that Counts IV and V should be dismissed against Defendants Perry. [Dkt. 54, at 4]. Counts IV and V allege violations of substantive constitutional rights under § 1983 which are governed by M.G.L. c.260 § 2A. [Dkt. 1, ¶¶254-336]; *see Street*, 936 F.2d at 39. Therefore, based on the reasoning in *Duffy* and *Pidge*, Plaintiff Anderson's cause of action is not time-barred because his § 1983 claims are governed by M.G.L. c.260 § 2A, not Chapter 249.

B. Plaintiff Miller's Claims are Not Precluded by His Certiorari Claim in the Superior Court.

a. Parties' Arguments

Defendants also argue that Miller's claims against Perry should be dismissed since he currently has a certiorari claim pending in state court. [Dkt. 54, at 4-5]. Miller's state court

complaint challenges the conduct and outcome of the hearing presided over by Defendant Perry. [Dkt. 54, at 5]. Defendants again assert that any challenge to a prison disciplinary proceeding is considered a 'claim in the nature of certiorari' and that Miller's claims in federal court would be barred by the doctrine of res judicata. [Dkt. 54, at 5].

In the alternative, Defendants argue that if Miller's certiorari claims in this case are not dismissed, they should at least be stayed pending the outcome of the state action. [Dkt. 54, at 6]. Admitting that nothing specifically precludes concurrent pending state and federal actions, Defendants argue the abstention doctrine described by the Supreme Court "allows federal courts in limited instances to stay or dismiss proceedings that overlap with concurrent litigation in state court." [Dkt. 54, at 6] (quoting *Jiménez v. Rodríguez–Pagán*, 597 F.3d 18, 21 (1st Cir. 2010) (citing *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976))). Based on the *Jiménez* factors to be considered when determining whether to the abstain, Defendants assert that because (1) the certiorari issues are already being decided in a state court, (2) the state action was filed first, (3) state law controls, and (4) the state court is an adequate forum to protect Miller's interests, this Court should stay the certiorari claims pending the conclusion of the state action. [Dkt. 54, at 7].

Plaintiff Miller argues that Defendants' issue preclusion claim must necessarily fail because there has been no judgment in Miller's state court certiorari action and therefore the argument is premature. [Dkt. 58, at 16]. Additionally, Miller asserts that different legal issues are raised in each case. [Dkt. 58, at 16]. The only legal issue Miller raises in the state action is whether the guilty disciplinary findings are sustained by substantial evidence." [Dkt. 58, at 16]. Miller argues that even if DOC were to prevail in state court, the existence of substantial evidence is not a bar to recovery if Defendants took disciplinary action against Miller at least in

part for his exercise of constitutional rights. [Dkt. 58, at 16-17] (citing *Howland v. Kilquist*, 833 F.2d 639, 644 (7th Cir. 1987)). Finally, Miller argues that there is no basis to stay because any favorable ruling in state court does not bar Miller's constitutional claims. *Id.*

b. Analysis

i. Res Judicata

Defendants' issue preclusion argument must fail because there has not been a final judgement in Plaintiff Miller's state court certiorari action. In a § 1983 action "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School District*, 465 U.S. 75, 104 S. Ct. 892, 898-99 (1984). In Massachusetts, issue preclusion applies when:

> (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication. Additionally, the issue decided in the prior adjudication must have been essential to the earlier judgment.

Kobrin v. Bd. of Registration in Med., 832 N.E.2d 628, 634 (Mass. 2005) (internal quotations and citation omitted). "For the doctrine to apply, there must be a valid and binding judgment in the prior action." *Popps v. Barnhart*, 2004 WL 240566, at *3 n.7 (D. Mass. Feb. 9, 2004) (Stearns, J.) (citing *Grella v. Salem Five Cent Savings Bank*, 42 F.3d 26, 30 (1st Cir. 1994)). Given that there has not been a final judgment in the Superior Court, Defendant's res judicata argument must fail. *See Popps*, 2004 WL 240566, at * 3 n.7 (declining to consider issue preclusion argument as it was premature due to no final judgement in ongoing administrative process).

Even if the Court where to consider the res judicata argument at this time, Defendants should still fail as a favorable outcome in the Superior Court would not preclude Miller's § 1983

claims brought in this case. Miller's state Chapter 249 complaint argues that there was no substantial evidence to sustain the charges against Miller and requests that the underlying disciplinary hearing decision be set aside. [Dkt. 54-2, at 5-6]. Courts reviewing claims under Chapter 249 "need only inquire whether the commission's decision was legally tenable and supported by substantial evidence on the record as a whole." *Gloucester v. Civil Serv. Comm'n*, 557 N.E.2d 1141, 1144 (Mass. 1990). Therefore, if Defendants were to prevail in state court, the ruling would only determine there was substantial evidence to support Defendant Perry's decision. However, several courts have found that "an act in retaliation for the exercise of constitutional right is actionable under Section 1983 even if the act, when taken for different reasons, would have been proper." *Gomes v. Randle*, 680 F.3d 859, 866 (7th Cir. 2012) (quoting *Howland*, 833 F.2d at 644); *accord Franco v. Kelly*, 854 F.2d 584, 590 (2d Cir. 1988); *see also Mole v. Univ. of Massachusetts*, 814 N.E.2d 329, 345–46 (Mass. 2004) (finding for First Amendment retaliation, plaintiff must prove that "the adverse action was motivated at least in part by the plaintiff's protected conduct"). As a result, even if there was substantial evidence to support the charges against Miller, Plaintiffs would still have an actionable § 1983 claim if the hearing was an act of retaliation, and so the § 1983 claim would not be barred by res judicata.

ii. Staying of Proceedings

Defendants' request to stay federal proceeding until the conclusion of Miller's state case has some merit but should still be denied given First Circuit precedent. Prior to a final judgement made in state court, "the presence of parallel litigation in state court will not in and of itself merit abstention in federal court." *Jiménez*, 597 F.3d at 27 (citing *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). However, the Supreme Court in *Colorado River* has outlined a "narrow" exception which "allows federal courts in limited instances to stay or dismiss proceedings that overlap with concurrent litigation in state court." *Id.* at 21 (citing *Colo. River*, 424 U.S. at 819). Abstention

requires "a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise." *Id.* at 28 (citing *Colo. River*, 424 U.S. at 818-19). Additionally, "the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 16 (1983).

The First Circuit has developed a non-exclusive list of factors for courts to consider when determining if the Colorado River exception to jurisdiction applies:

> (1) whether either court has assumed jurisdiction over a res; (2) the [geographical] inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether state or federal law controls; (6) the adequacy of the state forum to protect the parties' interests; (7) the vexatious or contrived nature of the federal claim; and (8) respect for the principles underlying removal jurisdiction.

Jiménez, 597 F.3d at 27-28 (quoting *Rio Grande Cmty. Health Ctr. v. Rullan*, 397 F.3d 56, 71-72 (1st Cir. 2005). This test is only satisfied in rare cases. *Id.* at 28 ("Unsurprisingly, the cases that satisfy this test are few and far between.") The first factor—involvement of a res—is not applicable here given that Plaintiffs are only seeking monetary damages and equitable relief. *Cf. id.* at 28 (finding first factor appliable since plaintiffs' claims included option on defendant's apartment, and not just monetary damages). The second, seventh, and eighth factors also have little impact on the inquiry: the federal and state forums are both equally convenient (second factor); the Plaintiffs' federal lawsuit is not contrived or vexatious (seventh factor); and removal jurisdiction is not relevant here since Defendants are not trying to remove a cause of action from

state court to federal court (eighth factor). Defendants conceded that only the third, fourth, fifth, and sixth factors apply. [Dkt. 54, at 7].

The third factor concerning "piecemeal litigation" looks to avoid "something more than just the repetitive adjudication that takes place in all cases implicating *Colorado River* doctrine." *Jiménez*, 597 F.3d at 29 ("A duplication of effort, while wasteful, is not exceptional.") (citation omitted). Rather, "concerns about piecemeal litigation should focus on the implications and practical effects of litigating suits deriving from the same transaction in two separate fora, and weigh in favor of dismissal only if there is some exceptional basis for dismissing one action in favor of the other." *Id.* (citing *KPS & Assocs., Inc. v. Designs by FMC, Inc.*, 318 F.3d 1, 10-11 (1st Cir. 2003)). Defendants argue that factor three is met because "the certiorari issues are already being decided in state court." [Dkt. 54, at 7]. However, this argument merely focuses on the duplicative nature of the proceedings and fails to point to "some exceptional basis for dismissing one action in favor of the other." *Jiménez*, 597 F.3d at 29. Examples of instances where courts have found exceptional circumstances have been when there is a federal statute that requires unified proceedings, *see Colo. River*, 424 U.S. at 819, or are there are non-diverse parties joined in the state action but not the federal one, *see Jiménez*, 597 F.3d at 30, neither of which are the case here. Absent some unique feature beyond "routine inefficiency," factor three counsels against abstention. *See Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 915 F.2d 7, 16 (1st Cir. 1990).

Defendants interpret factor four to mean that because "the certiorari action was filed months before the federal action," this factor is satisfied. [Dkt. 54, at 7]. This view contradictions the interpretation of the First Circuit, which has stated that the fourth factor's label is "somewhat of a misnomer." *Jiménez*, 597 F.3d at 30. The factor is not a determination "automatically

favoring the party who files first, but rather a concept that favors the case that is the more advanced at the time the *Colorado River* balancing is being done." *Elmendorf Grafica, Inc. v. D.S. America, Inc.*, 48 F.3d 46, 52 (1st Cir. 1995). The Court must "measure which action -- the suit in the federal court or that in the state court -- is the more advanced in a 'pragmatic, flexible manner, with a view to the realities of the case at hand.'" *Id.* (quoting *Moses H. Cone*, 460 U.S. at 21). The First Circuit in *Jiménez* considered the docket sheet in both the Puerto Rico and federal court and found that it was unclear "how close to trial the Puerto Rico case was." *Jiménez*, 597 F.3d at 31 n.9. However, the "significant disparity in favor of the Commonwealth court [was] clear enough" since the Puerto Rico case was "well into the discovery stage" while the federal action was still focusing on jurisdictional questions. *Id.* at 31 & n.9. Considering the state court docket here, the last activity in the state case was the filing of a Second Amended Answer by DOC on March 29, 2022. As there has not been an answer filed in this case, it appears that the state proceeding has advanced slightly further than the federal proceeding. However, given that it is unclear from the state docket how far the case has progressed and the lack of "significant disparity" between the courts' progress, the fourth factor likely does not counsel for abstention.

The fifth factor—whether state or federal law controls—is also not as simple as the Defendants suggest. The factor is applicable when the "parties' claims present particularly novel, unusual or difficult questions of legal interpretation" such that the case would best be left with the corresponding court. *Elmendorf*, 48 F.3d at 52. While state law does control Miller's certiorari claim, it does not control his substantive constitutional claims brought under § 1983 in this case. Furthermore, even if state law was to control here, there is no evidence that Miller's case is "particularly novel" to meet this rare exception to exercising jurisdiction.

Finally, factor six also does not favor abstention. In fact, the First Circuit has explicitly determined "this factor to be important only when it disfavors abstention" as "the possibility that the state court proceeding might adequately protect the interests of the parties is not enough to justify the district court's deference to the state action." *United States v. Fairway Capital Corp.*, 483 F.3d 34, 43 (1st Cir. 2007); *see Jiménez*, 597 F.3d at 28 (finding fact that whether the state court was equipped to protect plaintiff's interest was "neutral factor" given that federal court was equally well equipped to protect the plaintiff). Therefore, since both the Superior Court and this Court are capable of protecting Miller's interests, the sixth factor does not favor abstention here. As all of the First Circuit factors are either neutral or favor federal jurisdiction, the *Colorado River* abstention doctrine is not applicable. As a result, this Court should deny Defendant's request to stay proceedings.

II. Defendant's Motion to Dismiss Count V against Walker Should be Denied.

A. Parties' Arguments

Defendants argue that Plaintiff Miller has failed to show he has suffered any actual or threatened injury resulting from Defendant Walker's alleged actions in this case, and therefore, his claim against Walker should be dismissed for lack of standing. [Dkt. 54, at 9]. According to Defendants, even if Walker had made false statements to the hospital staff, Miller "merely states that the doctor's comment will 'remain in his medical records'" and that he vaguely asserts that the statements were used against him. *Id.* at 10 (citing Dkt. 1, ¶¶ 127, 323). They argue that because Miller does not allege Walker's statements "affected his subsequent medical treatment or the actions of hospital personnel in treating him," his claims against Walker should be dismissed. *Id.*

Plaintiff Miller disagrees and argues that he does have standing for his claims against Walker. [Dkt. 58, at 18]. Pointing to the Complaint, Miller asserts that Walker made false

statements to medical staff that were then included in Miller's medical records as facts. *Id.* at 18-19 (citing Dkt. 1, ¶¶ 126, 127, 244-245, 323). These statements were then used as material evidence in Miller's disciplinary proceeding. *Id.* Defendant Perry—the hearing officer—"found 'factual' the statements in the medical report made by WALKER to hospital staff," which described that "[t]he patient attempted to kick the dog while walking past. The dog took exception and bit his left leg, causing the patient to fall and hit his head on the ground." *Id.* at 19 (quoting Dkt. 1, ¶244). As a result of this finding, Perry found Miller guilty of attempted assault on an animal and Miller served thirteen months in solitary confinement. *Id.* (citing Dkt. 1, ¶¶244-245, 247, 251-253). Miller argues that this was not only a concrete harm, but also that "the injury caused by Walker is fairly traceable to his conduct in making the false statements." *Id.* at 19-20. Given that Miller suffered an injury in fact, the injury is traceable to Walker's conduct, and the injury is redressable by compensatory damages pursuant to 42 U.S.C. § 1983, punitive damages, and equitable relief including expungement of his disciplinary record, Miller argues that the motion to dismiss should be denied. *Id.* at 20.

B. Analysis

Assuming the facts in the Complaint to be true, Plaintiff Miller does have standing to sue and Defendants' motion to dismiss the claims against Defendant Walker should be denied. To bring a case in federal court, a plaintiff must establish three elements: "the plaintiff must have (1) suffered an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). The plaintiff bears the burden of establishing these elements. *FW/PBS, Inc. v. Dallas*, 493 U. S. 215, 231 (1990). When a case is at the pleading stage, the court must take "all well-pleaded facts in the complaint as true and indulge all reasonable inferences in [the plaintiff's] favor to determine

whether it plausibly pleaded facts necessary to demonstrate standing to bring the action." *Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc.*, 958 F.3d 38, 46-47 (2020) (internal quotation marks and citations omitted).

a. Injury in Fact

The injury suffered must be an invasion of a legally protected interest that is (i) "concrete and particularized," *Warth v. Seldin*, 422 U.S. 490, 508 (1975), and (ii) "actual or imminent, not 'hypothetical,'" *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). "An injury is concrete only if it "actually exist[s]" and is not just "a bare procedural violation." *Hochendoner v. Genzyme Corp*., 823 F.3d 724, 731 (1st Cir. 2016). "The particularization requirement . . . necessitates that a plaintiff has been affected 'in a personal and individual way' by the injurious conduct." Id. (citations omitted). For the injury to be "actual or imminent," it must either have happened or there must be a sufficient threat of the injury occurring. *Dantzler*, 958 F.3d at 47. Defendants argue that Miller fails to meet the first element of standing as he did not suffer "any actual or any threaten injury arising from defendant Walker's alleged actions." [Dkt. 54, at 9]. However, the Complaint describes that Miller was found guilty in a prison disciplinary hearing at least partially because of Walker's actions and served thirteen months in solitary confinement where he was refused confidential calls with his attorney, lost weight, remained in fear of further retaliation, and developed depression. [Dkt. 58, at 18] (citing Dkt. 1 ¶¶251-253). This is not a case of a "bare procedural violation," *Hochendoner*, 823 F.3d at 731, or an allegation for some future potential harm, *see Dantzler*, 958 F.3d at 47. Here, plaintiff has a permanent injury of a wrongful disciplinary charge on his record, in addition to having suffered physical and emotional harm in confinement.

b. Causation

The traceability element "requires the plaintiff show a sufficiently direct causal connection between the challenged action and the identified harm." *Katz v. Pershing. LLC*, 672 F.3d 64, 71 (1st Cir. 2012). The defendant's conduct does not need to be the proximate cause of the plaintiff's injury, but merely "fairly traceable." *Connor B. v. Patrick*, 771 F.Supp.2d 142, 151 (D.Mass. 2011) (Ponsor, J.); *see also Bennett v. Spear*, 520 U.S. 154, 168-69 (1997) (finding defendant's actions need not be "the very last step in the chain of causation."). "The Supreme Court has cautioned against courts finding that a plaintiff's injury is fairly traceable to defendant's conduct where the plaintiff alleges a casual chain dependent on actions of third parties." *Dantzler*, 958 F.3d at 48 (holding plaintiff lacked standing where the actions of multiple third parties acting independently were critical to plaintiff's casual chain). However, the intervening conduct of a third party is not necessarily fatal to Article III standing, as "[t]he traceability requirement focuses on whether the asserted injury could have been a consequence of the actions of the defendant rather than being attributable to the 'independent' acts of some other person not before the court." *Chevron Corp. v. Donziger*, 833 F.3d 74, 121 (2d Cir. 2016) (citing *Lujan*, 504 U.S. at 560). Therefore, an injury may be fairly traceable if the injury was "produced by determinate or coercive effect [of the defendant's challenged action] upon the action of someone else." *Bennett*, 520 U.S. at 168-69.

It is less clear whether there is a causal link tracing Miller's injury to Walker's conduct. However, I would still recommend the Court find the causation prong met. Defendants assert Miller's injury is not fairly traceable because the Complaint only "vaguely" says Walker's statements "were used against Miller." [Dkt. 54, at 10] (citing Dkt. 1, ¶323). This argument ignores later facts in the Complaint. The Compliant describes how Walker told medical staff that Miller "had kicked or attempted to kick the attack dog [involved in the Cell 15 assault]." [Dkt. 1,

¶¶126]. The doctor then wrote this down in Miller's medical report (instead of the previous statement made by Miller that the officers had attacked him). [Dkt. 1, ¶¶244]. The report was evidence in Miller's disciplinary hearing adjudicated by Defendant Perry. [Dkt. 1, ¶¶244]. Perry took the statement in the medical report that Miller "attempted to kick the dog while walking past" as true and subsequently found Miller guilty of attempting to assault an animal. [Dkt. 1, ¶¶244, 247]. As a direct result of this finding, Miller was sentenced to eighteen months in solitary confinement.

There is an argument that Walker's actions are too far removed from Miller's injury because of the involvement of third parties. *See Dantzler*, 958 F.3d at 48 (holding plaintiff lacked standing where the actions of multiple third parties acting independently were critical to plaintiff's casual chain). However, in cases where courts have found the involvement of third parties attenuated the causal link, there were numerous third parties whose independent actions had a speculative effect on the plaintiff's injury. *See, e.g.*, *id.* (finding lack of standing because injury depended on independent actions of ocean freight carriers); *Allen v. Wright*, 468 U.S. 737, 759 (1984) (denying standing due to numerous third parties—officials of racially discriminatory schools and the parents of children attending such schools—whose individuals decisions may not collectively have effect on ability of public school students to receive desegregated education). By contrast, when the plaintiff has shown that the third party's actions were predictable and therefore could explicitly allege each link in the chain of causation, courts have found the plaintiff to have standing. *See, e.g.*, *DOC v. New York*, 139 S.Ct. 2551, 2556 (2019) (holding plaintiffs had standing because injury relied on the predictable effect of government action on the decisions of third parties when answering citizenship questions); *Heldman v. Sobol*, 962 F.2d 148 (2d Cir. 1992) (finding standing to sue when a single third party's role in injury was a direct

result of the challenged regulation). Here, due to the limited number of third parties involved—the doctor who wrote down Walker's allegedly false statements and Defendant Perry—each link in the causal chain has been alleged and their actions are predictable. Walker's alleged false statements do not need to be the proximate cause for Miller's wrongfully disciplinary charge; it is sufficient that Defendant Perry's reliance on the medical report is fairly traceable to Walker's false statements.

c. Redressability

The final element of standing—redressability—is "a matter of degree." *Katz*, 672 F.3d at 72. The plaintiff "need not definitively demonstrate that a victory would completely remedy the harm," but rather that "a favorable resolution of her claim would likely redress the professed injury." *Id.* (citations omitted). Assuming Miller's injury is the wrongful charge on his disciplinary record and the emotional and physical harm he suffered in confinement, it appears likely Miller satisfies the third element of standing as well. The Complaint requests compensatory damages pursuant to § 1983, punitive damages to the extent proper, and equitable relief in the form of expungement of his disciplinary record. [Dkt. 1, ¶¶323, 325]. The remedies would not correct his time served in confinement but would clear him of the lasting harm the disciplinary record could cause. For these reasons, I recommend the Court deny Defendants' motion to dismiss Count V against Defendant Walker.

CONCLUSION

For the reasons stated above, I recommend the Court **DENY** Defendants' motion to partially dismiss.

Applicant Details

First Name	**Meighan**
Last Name	**Parsh**
Citizenship Status	**U. S. Citizen**
Email Address	**meighanp@live.unc.edu**
Address	**Address** Street **1300 Fordham Blvd, Apt. 445** City **Chapel Hill** State/Territory **North Carolina** Zip **27514** Country **United States**
Contact Phone Number	**6159620727**

Applicant Education

BA/BS From	**University of North Carolina-Chapel Hill**
Date of BA/BS	**May 2021**
JD/LLB From	**University of North Carolina School of Law** **https://law.unc.edu/**
Date of JD/LLB	**May 11, 2024**
Class Rank	**50%**
Law Review/Journal	**Yes**
Journal(s)	**North Carolina Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Scardulla, Annie
scardull@email.unc.edu
985-320-7797
Carissa, Hessick
chessick@unc.email.edu
Eichner, Maxine
meichner@email.unc.edu
919.843.5670

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MEIGHAN R. PARSH
1300 Fordham Boulevard, Apt. 445, Chapel Hill, NC 27514 • 615.962.0727 • meighanp@live.unc.edu

June 6, 2023

The Honorable Jamar Walker
United States District Court
for the Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year law student at the University of North Carolina School of Law seeking a clerkship to begin in 2024. Enclosed are my resume, writing sample, letters of recommendation, and law school transcript.

I am particularly interested as a serving as a clerk in your chambers because of my commitment to using my legal education to continue my service to my local community. This commitment is inspired by my experience as a leader in a local student-run nonprofit serving UNC Children's. In your chambers, I believe I can continue to embody that spirit of service to my community. This is especially true because I am currently serving the Albemarle County community through my summer internship, and my family also lives in Virginia.

My internship experience has also solidified my interest in serving as a clerk by giving me the opportunity to spend extensive time in the courtroom. Seeing the impact of the judicial system on the lives of community members has given me a greater appreciation for the work that goes on in chambers and in the courtroom and will inform my work as a clerk.

I believe that my strong legal research and writing skills will be an asset to your chambers. I am currently serving as an Articles Editor for the *North Carolina Law Review*, and my student comment is forthcoming in Volume 102. Writing this piece required extensive statutory interpretation, in-depth analysis of developing case law, and synthesizing complex legal scholarship. I am excited to continue to refine my writing and develop these skills as I co-author a law review article with Professor Carissa Hessick later this year. I have also served in two research assistant positions, both of which gave me the opportunity to adapt my skills to new types of legal and non-legal research.

Thank you for your time and consideration, and I look forward to hearing from your chambers about this position soon.

Sincerely,

/s/ Meighan R. Parsh

Enclosures

MEIGHAN R. PARSH

1300 Fordham Boulevard, Apt. 445, Chapel Hill, NC 27514
(615) 962-0727 | meighanp@live.unc.edu

EDUCATION

University of North Carolina School of Law, Chapel Hill, North Carolina
Juris Doctor, expected May 2024
GPA: 3.54

- Articles Editor, *North Carolina Law Review*
- Student Bar Association Faculty Selection Committee, Member
- Student Bar Association Health and Wellness Committee, Member
- Performed 19 hours of pro bono service

University of North Carolina at Chapel Hill, Chapel Hill, North Carolina
Bachelor of Arts, Political Science and Communication Studies, May 2021
GPA: 3.89; Dean's List; Graduated with Highest Distinction
Honors:

- Phi Beta Kappa, national academic honorary society
- Pi Sigma Alpha, national Political Science honor society
- Lambda Pi Eta, national Communication Studies honor society

PUBLICATION

- *Dueling Discretion: The Imperfect Mechanisms for Removing Elected Prosecutors*, 102 N.C. L. REV. (forthcoming Jan. 2024)

EXPERIENCE

Fair and Just Prosecution, Charlottesville, Virginia
Summer Fellow, May–July 2023

- Serve as an intern for the Albemarle County Commonwealth's Attorney's Office
- Write a policy reform project to contribute to criminal justice reform efforts in the office

Prosecutors and Politics Project, University of North Carolina School of Law, Chapel Hill, North Carolina
Research Assistant, May 2022–Present

- Collect local prosecutor election results and campaign contribution data from multiple states
- Research and code enforcement policy positions of local prosecutor candidates
- Research and code media coverage of local prosecutor candidates

Professor Maxine Eichner, University of North Carolina School of Law, Chapel Hill, North Carolina
Summer Research Assistant, May–August 2022

- Researched and compiled case studies in medical literature
- Prepared and proofread state statutory framework documents
- Conducted research on child welfare policy issues and drafted a memorandum on the findings

Carolina For The Kids Foundation, Chapel Hill, North Carolina
Executive Director, April 2020–April 2021

- Led all organizational operations, resulting in over $260,000 donated to UNC Children's and the Ronald McDonald House of Chapel Hill

INTERESTS

Experimenting with comfort food recipes, watching women's soccer, running

UNC SCHOOL OF LAW

THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL
SCHOOL OF LAW

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Unofficial Transcript

Note to Employers from the Career Development Office: Grades at the UNC School of Law are awarded in the form of letters (A, A-, B+, B-, C, etc.). Each letter grade is associated with a number (A = 4.0, A- = 3.7, B+ = 3.3, B = 3.0, etc.) for purposes of calculating a cumulative GPA. An A+ may be awarded in exceptional situations. For more information on the grading system, including the current class rank cutoffs, please contact the Career Development Office at (919) 962-8102 or visit our website at https://law.unc.edu/careers/for-employers/grading-policy-faq/

Student Name: Meighan R. Parsh

Cumulative GPA: 3.541

Course	Description	Term	Grade	Units
LAW 209	TORTS	2021 Fall	B+	4.00
LAW 199	TRANSITION TO THE PROFESSION	2021 Fall	PS	0.50
LAW 204	CONTRACTS	2021 Fall	B	4.00
LAW 201	CIVIL PROCEDURE	2021 Fall	B+	4.00
LAW 295	RES,REAS,WRIT,ADVOC I	2021 Fall	A-	3.00
LAW 205	CRIMINAL LAW	2022 Spring	B+	4.00
LAW 199	TRANSITION TO THE PROFESSION	2022 Spring	PS	0.50
LAW 207	PROPERTY	2022 Spring	B+	4.00
LAW 296	RES,REAS,WRIT,ADVOC II	2022 Spring	B+	3.00
LAW 234A	CONSTITUTIONAL LAW	2022 Spring	A-	4.00
LAW 206	CRIM PRO INVESTIGATION	2022 Fall	B+	3.00
LAW 266F	PROF RESPONSIBILITY	2022 Fall	B+	3.00
LAW 252	INTERNATIONAL LAW	2022 Fall	A	3.00
LAW 275	SECURED TRANSACTIONS	2022 Fall	A-	3.00
LAW 242	EVIDENCE	2023 Spring	A	4.00
LAW 228	BUSI ASSOCIATIONS	2023 Spring	A-	4.00
LAW 561	PROSECUTORS & CRIM JUSTICE SYS	2023 Spring	A	3.00
LAW 464	CRITICAL LEGAL THOUGHT	2023 Spring	A	3.00

GPA Calculation		
Total Grade Points	54.800	198.300
/ Units Taken Toward GPA	14.000	56.000
= GPA	**3.914**	**3.541**

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing on behalf of Meighan Parsh and am highly recommending her for the clerkship position in your chambers. I worked with Meighan as one of her first-year Legal Research, Reasoning, Writing, and Advocacy (RRWA) professors. I know her to be bright, hardworking, and eager for a chance to demonstrate her intellect and passion for the law. As noted below, Meighan would be an asset to your chambers for multiple reasons.

First, Meighan is a quick study and a natural critical thinker. Meighan immediately stood out in my class as a legal mind. Her written submissions were thoughtful, thorough, and strategic. In class, we merely polished her existing skill. She worked hard to master structure, clarity, and depth in her writing. She worked independently and demonstrated initiative. At the same time, she welcomed feedback, and she always incorporated my instruction when necessary.

I really got to witness Meighan's independent work product, however, when she wrote her law review comment. Without being required to, Meighan asked me to read multiple drafts of her comment. With each draft, her writing got stronger. She was determined to submit a piece that was worthy of publishing, and she did just that. I am confident that Meighan would bring the same level of determination and skill to your chambers.

Second, Meighan is generous with her talent and spirit. In RRWA, the students learn in groups through various interactive exercises and activities. Proficiency levels can vary, so a student's interpersonal skills are often tested just as frequently as their analytical skills. Meighan stood out in a group setting as an honest yet empathetic peer. She provided thorough yet fair feedback and never judged others or isolated herself. She was kind, and as her professor, I really appreciated that.

Meighan's generous spirit is further evidenced by her legal interest in criminal justice. Meighan's submission materials demonstrate that her pursuit for justice started early in life and that she will work diligently to learn what is needed to be a successful advocate. Overall, I am confident that Meighan would not take this opportunity for granted.

If you have any further questions, you can reach me at scardull@email.unc.edu or 985-320-7797. Thank you for your time.

Sincerely,

Annie Scardulla

June 06, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of Meighan Parsh's application for a clerkship in your chambers. Ms. Parsh has impressed me with her excellent writing skills, her intelligence, her professionalism, and her amazing work ethic. I believe that she will be an excellent law clerk, and I give her my highest recommendation.

Ms. Parsh has taken three classes with me here at the University of North Carolina: my first-year criminal law class, the upper-level criminal procedure class that I teach, and a seminar on prosecutors. Ms. Parsh was deeply engaged in all three classes. For the two podium classes, criminal law and criminal procedure, she often came to office hours with questions she had prepared based on the material we had covered in class, and she was quick to raise some of the thorny problems posed by the reading and the class discussions. Although she may not have received the highest grade in those classes, I have no doubt that she completely mastered the material.

Ms. Parsh has not only been a student of mine, she has also been a trusted research assistant. She has worked with me for multiple semesters on a large project about prosecutors and their role in society—a project that employs multiple student research assistants. Ms. Parsh stands out from that group of students: Her work is meticulous, and she always completes her assignments quickly. Her professionalism skills are also impressive. On her own initiative, she sends me weekly updates on her work, in which she clearly outlines what she has done and carefully estimates how much work she has left to do. All of her work has been excellent. As a consequence, I have often given her assignments that I would not trust other students to complete.

In addition to her classroom performance and research skills, I have been able to observe Ms. Parsh's writing skills. In particular, I have had the opportunity to work with Ms. Parsh on two major writing projects. First, I served as an informal advisor for Ms. Parsh's student note for the North Carolina Law Review. Her work on the note has been impressive. She performed copious amounts of research and synthesized large amounts of material on state law and practices surrounding the removal of local prosecutors. Her note revealed significant information that I did not previously know because it is not part of the academic literature in the area. I have subsequently relied on that work in media calls that I have fielded about state efforts to limit the power of local prosecutors.

Ms. Parsh's work on her student note demonstrated not only great research and synthesis skills, but also excellent writing skills. She was able to convey nuanced legal differences in simple and straightforward language while not sacrificing any of the complexity. Ms. Parsh also demonstrated that she possesses perhaps the most important skill for a successful legal writer—the ability to internalize constructive feedback and significantly improve a piece of writing through extensive revisions.

Ms. Parsh's writing skills far surpass the skills of a typical law student, a fact that was driven home this semester. As a student in my seminar, Ms. Parsh has been writing a substantial research paper. Like all of the seminar students, Ms. Parsh has submitted drafts of various sections of her paper during the course of the semester and received written feedback from me on those drafts. Reading her work alongside the work of her peers has highlighted for me how impressive Ms. Parsh's writing skills are. Her work is closer to the drafts that I read from my junior colleagues than the drafts I read from her fellow students.

To drive home exactly how impressed I am by Ms. Parsh's student note and seminar paper, I will share with you that I recently asked Ms. Parsh to co-author a law review article with me. The article will draw on some themes that she has developed in her two writing projects, as well as several conversations that we have had on similar topics. This is only the second time in my law teaching career that I have invited a student to write an article with me. And I have no doubt that Ms. Parsh will be an excellent co-author.

Ms. Parsh is so impressive because she is not only intelligent, but also because she has an incredible work ethic. For example, every day, I arrive at the law school early in the morning, usually long before any classes are scheduled to start. As I walk through the building, I walk past several tables in our law school's rotunda. Each and every morning, Ms. Parsh is seated at one of those tables, hard at work. Ms. Parsh doesn't simply work hard; she is thoughtful about how she approaches tasks and challenges. Whenever she has been dissatisfied with her performance in a class or on an assignment, Ms. Parsh has been quick to assess what she could have done differently. She then invariably puts in more time, working not only harder, but also smarter, in order to master whatever task she is facing.

The time that I have spent with Ms. Parsh—as her professor, her supervisor, and her advisor—has convinced me that she will be an excellent law clerk. It has been a real joy to work with someone who takes her legal education so seriously. And so, I hope that you give Ms. Parsh's application the serious attention that it deserves. She would make an excellent addition to your chambers.

Please let me know if you have any questions or would like any additional information about Ms. Parsh. I can be reached via email at chessick@email.unc.edu or by telephone at 919-962-4129.

Sincerely,

Hessick Carissa - chessick@unc.email.edu

Carissa Byrne Hessick
Ransdell Distinguished Professor of Law

Hessick Carissa - chessick@unc.email.edu

June 06, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Meighan Parsh, a second-year law student at the University of North Carolina School of Law, where I am a professor, for a clerkship in your chambers beginning in the fall of 2024. Meighan was a research assistant for me last summer, and was a student in my seminar, Critical Legal Theory/Critical Lawyering, this past semester. Through both of these, I have come to know her well. I recommend her highly as a law clerk.

I first came to know Meighan when I hired her as my research assistant last summer. I learned while checking her references that she was a "finisher"—someone who unfailingly completed the tasks she was given completely and precisely. That turned out to be true. Meighan was an extremely diligent and organized researcher, who thoroughly and intelligently reviewed hundreds of medical articles that I asked her to sort through for a project I was working on. She was dedicated, responsive to criticism, and organized throughout. In class, I have found the same thing to be true: She is a diligent, dedicated, and low-maintenance student. She is generally quiet in class, but when she does speak, her answers are uniformly thoughtful. Although students have not yet turned in their final papers, I was unsurprised that, when I read the rough drafts that they turned in, Meighan's was by the far the most complete, the only paper in the class that was already well bluebooked, and that it was well organized, clearly written, and well thought out.

Outside of class, Meighan comes across as a very nice, hard-working student with deep convictions about the need for justice in the world. After law school and a clerkship, she wants to pursue a career in criminal law. I have no doubt that she will further the cause of justice in whatever role she eventually chooses in the criminal justice system. A clerkship in your chambers would help advance her on this path.

In short, I think Meighan would make an excellent law clerk and will someday make an excellent lawyer. I recommend her highly and am happy to answer any more questions you may have about her.

Sincerely,

Maxine Eichner
Graham Kenan Distinguished Professor of Law
UNC School of Law

Maxine Eichner - meichner@email.unc.edu - 919.843.5670

WRITING SAMPLE FOR MEIGHAN R. PARSH

1300 Fordham Boulevard, Apt. 445, Chapel Hill, NC 27514 • 615.962.0727 • meighanp@live.unc.edu

I prepared this motion memo for my Research, Reasoning, Writing, and Advocacy class in the Spring 2022 semester. This was an open universe assignment, and I was assigned to represent the United States (defendant) in this brief. This is the final draft and was written after receiving feedback from my professor on an earlier draft.

PRELIMINARY STATEMENT

The defendant respectfully requests that the court grant the motion to dismiss for lack of subject matter jurisdiction. The defendant's argument is that the plaintiff's claim is barred by the *Feres* doctrine and should thus be dismissed pursuant to FRCP 12(b)(1).

STATEMENT OF FACTS

The United States Army runs a weekend hunting program open to civilians and servicemembers at Fort Hunter Liggett (FHL), a U.S. Army live artillery fort. To participate in the hunting program, civilians are required to have a California hunting license and a FHL hunting permit. To obtain such a permit civilians must fill out an application affirming that they have read the FHL hunting regulations and pay a fee. Civilians must also check in with a servicemember at the Fishing and Hunting Center to show their license and permit, obtain a tag for their car, and inform the servicemember of what hunting area (HA) they will be hunting in.

Civilian hunters checking in at the Fishing and Hunting Center receive a copy of the base hunting regulations and a map of the base that must approved by military leadership in Washington D.C. On the day of the incident in question the map provided to hunters did not label HA 11 as "archery-only," because, although that change had been made by the military the year prior, the updated map had not yet been approved by military leadership. The rules provided on the day of incident did not list HA 11 as "archery-only," but there was a sign posted in the Hunting and Fishing Center to that effect.

Servicemembers hunting at FHL have a different check-in procedure. They receive a designated servicemember permit, and servicemembers under a certain rank (E-6) are not required to pay a fee. Servicemembers can get their permit on base at Camp Roberts, which adjoins FHL, and they do not have to go to the Fishing and Hunting Center to get it.

Servicemember hunters do receive a copy of the rules and a map, but they are permitted to travel on military personnel only roads at FHL that are not on the map that civilian hunters receive. Servicemembers are also permitted to enter restricted HAs and travel between HAs while hunting. Finally, servicemembers are not permitted to drink alcohol while at FHL, but civilians may.

On the day of the incident in question Private First Class (PFC) Justin Levin was hunting in HA 11 at FHL. PFC Levin had travelled from Camp Roberts to FHL on military personnel-only roads and through multiple HAs while on a weekend pass to go hunting. The hunter who fired the shot that hit PFC Levin was not aware that HA 11 was archery-only.

The parties have completed the pleadings stage and conducted depositions prior to conclusion of the discovery stage.

ARGUMENT

THIS COURT MUST DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE PLAINTIFF'S CLAIMS ARE BARRED BY THE *FERES* DOCTRINE.

A motion to dismiss related to the *Feres* doctrine is a "FRCP 12(b)(1) motion to dismiss for lack of subject matter jurisdiction." *Dreier v. United States*, 95 F.3d 1435, 1439 (9th Cir. 1996).

The doctrine of sovereign immunity generally prevents the United States government from being sued without permission. However, "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C.A. § 2674 (West). But under the *Feres* doctrine, the government is not liable for injuries to military servicemembers where "the injuries arise out of or are in the course of activity incident to service." *Schoenfeld v. Quamme*, 492 F.3d 1016, 1019 (9th Cir. 2007) (internal quotations omitted). *Feres* and *Johnson* require the

protection of the military disciplinary structure from harm resulting from civil action. *See Bon v. United States*, 802 F.2d 1092, 1096 (9th Cir. 1986).

In the Ninth Circuit, four factors are used to evaluate cases under the *Feres* doctrine, "(1) the place where the negligent act occurred, (2) the duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff because of the plaintiff's status as a service member, and (4) the nature of the plaintiff's activities at the time the negligent act occurred." *McConnell v. United States*, 478 F.3d 1092, 1095 (9th Cir. 2007). In applying these factors, "comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine is the most appropriate way to resolve *Feres* doctrine cases." *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001) (internal quotations omitted).

A. Factor one weighs in favor of a *Feres* bar because the incident occurred on military property.

The first *Johnson* factor to consider is "the place where the negligent act occurred . . . ." *McConnell*, 478 F.3d at 1095. Where the negligent act took place is not dispositive, but it is "undoubtedly an important indicator of the status of the injured service member." *Johnson v. United States*, 704 F.2d 1431, 1436 (9th Cir. 1983).

Here, the incident occurred at FHL, an active military training facility adjacent to Camp Roberts. PFC Levin was at FHL for recreational hunting under a special permit. Although civilians were also allowed to hunt at FHL with a permit, PFC Levin accessed FHL using roads that were limited to military use only and continued to use such roads while traveling within FHL. Furthermore, PFC Levin parked in his car in Hunting Area (HA) 12A, an area off-limits to civilians but accessible to service members with the appropriate sticker on their car. PFC Levin then crossed into HA 11, where the incident occurred, from HA 12A. Both actions arose from

PFC Levin's life on military property, and the entirety of the incident took place on military property.

B. Factor two weighs in favor of a *Feres* bar because the decedent was an active-duty service member at the time of the incident.

The second *Johnson* factor is "the duty status of the plaintiff when the negligent act occurred . . . ." *McConnell*, 478 F.3d at 1095. "The duty status of the plaintiff, while no dispositive, is often taken into account when deciding whether an activity is truly incident to service." *Johnson*, 704 F.2d at 1437. "The important question is whether the service member on active-duty status was engaging in an activity that is related in some relevant way to his military duties." *Id*. at 1438. Importantly, "military-sponsored activities fall within the *Feres* doctrine, regardless of whether they are related to military duties" and this includes "military-sponsored recreational programs." *Costo*, 248 F.3d at 868-69.

PFC Levin was an active-duty soldier stationed at Camp Roberts at the time of the incident. Although he was on a weekend pass while hunting at FHL, PFC Levin remained an active-duty service member. As noted above, PFC Levin was at FHL for recreational hunting, which in and of itself is not directly related to his military duties. However, the hunting program at FHL, including the permit and check-in processes and the Fishing and Hunting Center, is operated by entirely by the military. Lieutenant Colonel Easley oversees the operation of FHL, a servicemember operates Fishing and Hunting Center, and the maps and rules are published by the military, making hunting at FHL a military-sponsored activity. As such, PFC Levin's hunting activities at FHL were a part of a "military sponsored recreational program" and thus satisfy the second *Johnson* factor and weigh heavily in favor of barring the plaintiff's claim under the *Feres* doctrine.

C. Factor three weighs in favor of a *Feres* bar because the decedent was accruing benefits because of his military status at the time of the incident.

The third *Johnson* factor is "the benefits accruing to the plaintiff because of the plaintiff's status as a service member . . . ." *McConnell*, 478 F.3d at 1095. The *Feres* doctrine bars suits by service members injured while participating in "on-base or government-sponsored recreational activities." *Johnson*, 704 F.2d at 1438. Where "plaintiffs had access to the various recreational . . . benefits only because of their status as military personal . . . the injuries suffered were incident to service because the plaintiffs would not have been privileged to take advantage of the benefits but for their military status." *Id*. at 1438-39.

When the plaintiff's use of military facilities for recreational activities arises from a status not like that of any civilian also partaking in the activities, the plaintiff accrues benefits because of his status as a service member. *See Bon* 802 F.2d at 1094-95. For example, in *Bon*, the plaintiff was able to rent a canoe through the Special Services Center solely because of her status as a service member as civilians could only access the Center as guests or dependents of service members. *Id*. at 1095. The court reasoned that Bon "did not occupy a status similar to that of any civilian in her presence" while using the Center and its equipment. *Id*.

On the other hand, when a service member is "indistinguishable" from a civilian, he is not receiving benefits of his service. *See Dreier* 95 F.3d at 1444-45. For instance, in *Dreier* the decedent died while engaging in leisure activities on a military property that typically required civilians to obtain a permit to be present, but civilians could access the area in question without getting a permit or going through any military checkpoints. *Id.* The court reasoned that because of these facts a servicemember engaging in leisure activities in an area open to the public is "in the same position as any civilian would have been at the time of the government's negligence." *Id.* at 1445.

Here, PFC Levin was partaking in weekend hunting on FHL alongside civilians who had permits to use the military installation for the same purpose. However, PFC Levin's use of FHL and participation in hunting activities were different from that of the civilians present. First, PFC Levin did not have to pay for his hunting permit because of his military status and rank, whereas civilians had to pay a fee to obtain a permit, which is evidence that he accrued and benefit and occupied a status different than that of civilians. That difference is status is supported by the fact that service members have a special permit designating their military status. Furthermore, higher ranking service members did have to pay for a permit, which gives more support to the fact that PFC Levin was accruing a benefit of his military service while hunting at FHL. Finally, PFC Levin and other service members were subject to a different rule regarding alcohol consumption because the military prohibited service members from drinking while hunting, but no such restrictions existed for civils, proving once again that service members occupied a different status than civilians while using FHL.

Like the lack of a "status similar to that of any civilian" in the *Bon* case, PFC Levin and other service members hunting at FHL were allowed to move between HAs while hunting, a use of the military facilities only accessible because of his military status. Furthermore, PFC Levin was allowed to enter restricted HAs and travel on military use only roads while at FHL, a use arising from solely from his military status. Finally, service members hunting at FHL do not have to check in at the Fishing and Hunting Center, they can complete the permit and check-in process at Camp Roberts without notifying anyone of their hunting location, a privilege only available to service members. PFC Levin's movements on FHL were entirely different from those of civilian hunters, and he thus occupied a different status and accrued benefits due to his military service.

Unlike in *Dreier*, where the servicemember was "in the same position as any civilian would have been at the time of the government's negligence," PFC Levin was subject to rules that civilian hunters were not. He, and any other servicemember hunting at FHL, could not consume alcohol while hunting, making him distinguishable from a civilian while hunting. Also, unlike in *Dreier*, the facts indicate that civilians did not enter FHL or any of the restricted HAs or military use only roads without the required permits. These facts distinguish PFC Levin from civilians also present at FHL and make it clear that he was accruing benefits of his military service while hunting on the day of the incident.

D. Factor four weighs in favor of a *Feres* bar because the nature of the decedent's activities at the time of the incident were incident to his military service.

The fourth *Johnson* factor is "the nature of the plaintiff's activities at the time the negligent act occurred." *McConnell*, 478 F.3d at 1095. For this factor it is important to distinguish whether the service member's activities at the time of the alleged negligence were of the sort that "could harm the disciplinary system if litigated in civil action." *Johnson*, 704 F.2d at 1439. This is because military decision-makers subject to civil suit "might not be willing to act as quickly and forcefully as is necessary . . ." if their actions can be second-guessed by a civil court, and it could encourage servicemembers to "question decisions by their superiors" and have "some effect on the willingness of such personnel to follow orders." *Id*.

When allowing the suit to proceed would require the discovery and evaluation of military command structure, instructions, and programs by a civilian court, the plaintiff's activities at the time the negligent act occurred are military in nature. *See McConnell*, 478 F.3d at 1097-98. For example, in *McConnell*, the plaintiff's activities were purely recreational but sponsored by the military and involved military maintenance and instruction. *Id*. The court reasoned that because the adequacy of the military's maintenance practices, boat use instructions, and recreational

programming would need to be evaluated to resolve the case, the claim could not proceed to protect the "military discipline" structure. *Id*. at 1098.

Here, the hunting activities at FHL that led to PFC Levin's death were of the sort that could harm the disciplinary system if litigated in civil court. The rules that PFC Levin was subject to while hunting at FHL implicate the military discipline system. Military rules barred PFC Levin from consuming alcohol while hunting, he was required to obtain a weekend pass because he would not have cell-service while on leave, and the hunting permit and rules were proscribed by the military. As such, the entirety of PFC Levin's actions at FHL were subject to the military discipline structure, which bars this claim from continuing under the *Feres* doctrine.

Furthermore, the key negligent act at issue in the plaintiff's claim is that the military failed to provide hunters with up-to-date hunting maps, rules, and adequate signage that identified HA 11 as archery-only. These materials were not current at the time of the incident because they had to be approved by the military chain of command in Washington, thus implicating the military discipline structure. This is like *McConnell* because litigating this case would require a civil court to examine and judge of military oversight practices, civilian hunting instructions, and service member recreation programs, which were all reasons the court dismissed the plaintiff's claim. Even though PFC Levin's activities were entirely recreational at the time of the incident, allowing the suit to proceed would require the discovery and evaluation of military command structure, instructions, and programs by a civilian court, making the plaintiff's activities at the time the negligent act occurred military in nature.

CONCLUSION

The plaintiff's claims and evidence are barred by the *Johnson* criteria used to evaluated whether service members can bring negligence cases against the United States under the *Feres*

doctrine and should be dismissed for lack of subject matter jurisdiction pursuant to FRCP 12(b)(1).

Applicant Details

First Name	**Sheena**
Last Name	**Patel**
Citizenship Status	**U. S. Citizen**
Email Address	**sp6zc@virginia.edu**
Address	**Address** Street **120 Turtle Creek Rd, Apt 9** City **Charlottesville** State/Territory **Virginia** Zip **22901** Country **United States**
Contact Phone Number	**4439742897**

Applicant Education

BA/BS From	**University of Maryland-College Park**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Law Review** **Virginia Environmental Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Jaffe, Caleb
cjaffe@law.virginia.edu
(434) 924-4776

Barzun, Charles
cbarzun@law.virginia.edu
(434) 924-6454

Gocke, Alison
agocke@law.virginia.edu
(434) 243-8545

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sheena Patel

120 Turtle Creek Rd., Apt. 9 Charlottesville, VA 22901 | (443) 974-2897 | sp6zc@virginia.edu

June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court, E.D. Va.
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

As a rising third-year student at the University of Virginia School of Law, I am writing to apply to a clerkship in your chambers for the 2024–2025 term. I expect to receive my J.D. in May 2024 and will be available to work any time after that.

Enclosed please find a copy of my resume, most recent law school transcript, undergraduate transcript, and a writing sample. In addition to these materials, you will also receive three letters of recommendation from Professors Cale Jaffe (434-924-4776), Alison Gocke (434-243-8545), and Charles Barzun (434-924-6454). Each of these recommenders would be happy to speak with you by phone.

If you have any questions or need to contact me for any reason, please feel free to reach me at the email address and phone number noted above. Thank you for your time and consideration.

Sincerely,

Sheena Patel

Sheena Patel

120 Turtle Creek Rd., Apt. 9 Charlottesville, VA 22901 | (443) 974-2897 | sp6zc@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2024 (GPA: 3.62)

- *Virginia Law Review*, Editorial Board Member
- *Virginia Environmental Law Journal*, Editor-in-Chief
- Environmental Law & Community Engagement Clinic, Clinic Student
- Law & Public Service Program, Fellow
- Sin Barreras ("Without Borders"), Pro Bono Volunteer

University of Maryland, College Park, College Park, MD
B.S. in Environmental Science & Policy; *B.A.* in Spanish Language & Culture, May 2021 (GPA: 4.0)

- Federal Fellows Program (policy seminar taught by field experts followed by federal sector internship)
- Environmental Science & Policy Program, Teaching Assistant (directed seminar of 25 students)
- Senior Marshal (for seniors demonstrating the highest levels of scholarship, service, and involvement)
- Graciela Nemes Award (awarded to valedictorian of graduating Spanish class)

EXPERIENCE

Southern Environmental Law Center, Charlottesville, VA
Glynn D. Key Environmental Justice Fellow, May 2023 – Aug. 2023

Environmental Defense Fund, Washington, DC
Legal & Regulatory Intern, May 2022 – Aug. 2022

- Assessed preexisting case law to create a primer on the Supreme Court's articulation of the major questions doctrine in light of the *West Virginia v. EPA* decision
- Drafted and reviewed EDF comments on rulemakings such as the Mercury and Air Toxics Standards
- Collaborated with partners at the Institute for Policy Integrity to write a memorandum anticipating legal challenges to the Biden administration's social cost of carbon metrics

U.S. Department of Agriculture, Animal & Plant Health Inspection Service, Riverdale, MD
Special Project Lead, Dec. 2020 – Feb. 2021

- Researched and presented on incorporating socioeconomic impact analyses and environmental justice concerns in federal environmental compliance documents

U.S. Department of Justice, Environment & Natural Resources Division, Washington, DC
Volunteer Intern, Environmental Crimes Section, Aug. 2020 – Dec. 2020

- Tracked the federal docket and communicated with attorneys to collect pleading documents to maintain an active "Brief Bank" on cases pertaining to illegal wildlife trafficking and marine pollution
- Transcribed witness interviews, conducted case-related research, and attended prosecution reviews

Earthjustice, Washington, DC
Policy & Legislation Intern, May 2019 – Aug. 2019

- Planned and implemented lobby days/briefings on Capitol Hill to mobilize disproportionately impacted communities such as Latino labor unions to discuss the impacts of recent bills with their legislators
- Testified at an EPA hearing on a proposed rulemaking under the Clean Air Act
- Drafted email blasts and fact sheets on federal environmental statutes to effectively communicate with and inform congressional staff of regulatory rollbacks and their implications

Environmental Law Institute, Washington, DC
Research & Publications Intern, Jan. 2019 – May 2019

- Delivered a presentation on novel strategies used in climate change litigation in Latin American nations
- Led the planning of training events like ELI's 15th Annual Western Boot Camp on Environmental Law

PERSONAL

- **Languages**: Spanish (professional fluency), Hindi (native fluency), Gujarati (native fluency)
- **Interests:** Charcoal sketching, hiking, Bollywood music

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Sheena Patel

Date: June 07, 2023
Record ID: sp6zc

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2021			
LAW	6000	Civil Procedure	4	A-	Woolhandler,Nettie A
LAW	6002	Contracts	4	B+	Nachbar,Thomas B
LAW	6003	Criminal Law	3	B	Bonnie,Richard J
LAW	6004	Legal Research and Writing I	1	S	Buck,Donna Ruth
LAW	6007	Torts	4	B+	Abraham,Kenneth S
		SPRING 2022			
LAW	6001	Constitutional Law	4	A-	Mahoney,Julia D
LAW	6112	Environmental Law	3	A-	Livermore,Michael A.
LAW	7088	Law and Public Service	3	A-	Kim,Annie
LAW	6005	Lgl Research & Writing II (YR)	2	S	Buck,Donna Ruth
LAW	6006	Property	4	A-	Schragger,Richard C.
		FALL 2022			
LAW	9282	Constitutional Law & Economics	3	A-	Gilbert,Michael
LAW	7009	Criminal Procedure Survey	4	B+	Harmon,Rachel A
LAW	7112	Energy Regulation and Policy	3	A	Gocke,Alison
LAW	6104	Evidence	4	A-	Barzun,Charles Lowell
		SPRING 2023			
LAW	6102	Administrative Law	4	A-	Bamzai,Aditya
LAW	8640	Enviro and Comm Eng Clinic	4	A	Jaffe,Caleb Adam
LAW	7062	Legislation	4	A-	Nelson,Caleb E
LAW	7201	Spanish for Lawyers	2	A-	Sanchez Leon,Nelson Camilo

UNIVERSITY OF MARYLAND
COLLEGE PARK
Office of the Registrar
College Park, MD 20742
UNOFFICIAL TRANSCRIPT
FOR ADVISING PURPOSES ONLY
As of: 06/14/21

Patel, Sheena Bhavesh
E-Mail: sheenpatel2@gmail.com
Major: Environmental Sci & Pol-Env Politic
Freshman - First Time Undergraduate Degree Seeking
GenEd Program Current Status: Registered Spring 2021
Double Degree: SPANISH LANG, LITERATURE

Fundamental Requirement Satisfied Math: AP; English: AP

Transcripts received from the following institutions:

Advanced Placement Exam on 07/04/17

** Transfer Credit Information **			** Equivalences **	
Advanced Placement Exam				
1401 U.S. GVPT/SCR 5	P	3.00	GVPT170	DSHS
1501 U.S. HISTORY/SCR 4	P	3.00	HIST201	DSHS or DSHU, DVUP
1601 CHEMISTRY/SCR 3	NC	0.00	No Credit	
ENG LANG/COMP/SCR 5	P	3.00	ENGL101	FSAW
WORLD HISTORY/SCR 4	P	3.00		L1
CALC BC/AB SUBSCR 5	P	0.00	No Credit	
CALCULUS BC/SCR 5	P	4.00	MATH140	FSAR, FSMA
CALCULUS BC/SCR 5	P	4.00	MATH141	
SPANISH LANG/SCR 5	P	3.00	SPAN204	
		Footnotes: 06		
SPANISH LANG/SCR 5	P	3.00	SPAN207	DSHU
1701 BIOLOGY/SCR 4	P	3.00	BSCI160	DSNL
BIOLOGY/SCR 4	P	1.00	BSCI161	
BIOLOGY/SCR 4	P	3.00	BSCI170	DSNL
BIOLOGY/SCR 4	P	1.00	BSCI171	
ENG LIT/COMP/SCR 5	P	3.00	ENGL240	
ENG LIT/COMP/SCR 5	P	3.00		L1
ENVRNMNTL SCI/SCR 4	P	3.00		DSNS
PSYCHOLOGY/SCR 5	P	3.00	PSYC100	DSHS or DSNS
STATISTICS/SCR 4	P	3.00	STAT100	FSAR, FSMA
Acceptable UG Inst. Credits:		**49.00**		
Applicable UG Inst. Credits:		**49.00**		

Total UG Credits Acceptable: 49.00
Total UG Credits Applicable: 49.00

Historic Course Information is listed in the order:

Course, Title, Grade, Credits Attempted, Earned and Quality Points

Fall 2017
MAJOR: ENVIRONMENTAL SCIENCE AN COLLEGE: AGRI & NATL RES

AREC240	INTRO ECON+ENVRNMT	A+	4.00	4.00	16.00	DSHS
COMM107	ORAL COMM PRIN	A+	3.00	3.00	12.00	FSOC
ENSP101	INTRO TO ENVIR SCIENCE	A+	3.00	3.00	12.00	DSNS
GEOG130	DEVLOPNG COUNTRIES	A+	3.00	3.00	12.00	DSHS or DSSP
SPAN301	ADV GRAMMAR&COMP I	A	3.00	3.00	12.00	
UNIV100	STUDENT IN UNIVERSITY	A	1.00	1.00	4.00	

**** Semester Academic Honors ****
Semester: Attempted 17.00; Earned 17.00; QPoints 68.00; GPA 4.000
UG Cumulative: 17.00; 17.00; 68.00; 4.000

Spring 2018
MAJOR: ENVIRONMENTAL SCIENCE AN COLLEGE: AGRI & NATL RES

ECON201	MACROECONOMIC PRINCIPLES	A+	3.00	3.00	12.00	DSHS
ENSP102	INTRO ENVIRON POLICY	A+	3.00	3.00	12.00	DSHS
GVPT200	INTERN POLI RELATIONS	A+	3.00	3.00	12.00	DSHS, DVUP
PSYC200	STAT METH IN PSYCH	A+	3.00	3.00	12.00	FSAR
SPAN303	CULTURAL MATERIALS HISP	A+	3.00	3.00	12.00	DSHU

**** Semester Academic Honors ****
Semester: Attempted 15.00; Earned 15.00; QPoints 60.00; GPA 4.000
UG Cumulative: 32.00; 32.00; 128.00; 4.000

Fall 2018
MAJOR: ENVIRONMENTAL SCIENCE AN COLLEGE: BEHAVIORAL SOCIAL SCI

AOSC200	WEATHER & CLIMATE	A+	3.00	3.00	12.00	DSNL, SCIS
AOSC201	WEATHER & CLIMATE LAB	A+	1.00	1.00	4.00	
ENSP399	SP TPCS IN ENSP	A	2.00	2.00	8.00	
GVPT280	COMPARATIVE POLITICS	A+	3.00	3.00	12.00	
HONR378J	ENRGY & ENVRNMNTL PLCY	A	3.00	3.00	12.00	
SPAN311	ADV CONVERSATN I	A+	3.00	3.00	12.00	

**** Semester Academic Honors ****
Semester: Attempted 15.00; Earned 15.00; QPoints 60.00; GPA 4.000
UG Cumulative: 47.00; 47.00; 188.00; 4.000

Spring 2019
MAJOR: ENVIRONMENTAL SCIENCE AN COLLEGE: BEHAVIORAL SOCIAL SCI

ENSP305	APPL QUANT ENV SCI PLCY	A+	3.00	3.00	12.00	
FGSM398	FED&GLBL EXPER LEARNING	A	6.00	6.00	24.00	DSSP
GVPT273	INTRO ENVRNTL POL	A+	3.00	3.00	12.00	DSSP
SPAN362	LTN AM LIT & CULT II	A	3.00	3.00	12.00	DSHU, DVUP

**** Semester Academic Honors ****
FEDERAL FELLOWS PROGRAM COMPLETED
Semester: Attempted 15.00; Earned 15.00; QPoints 60.00; GPA 4.000
UG Cumulative: 62.00; 62.00; 248.00; 4.000

Fall 2019
MAJOR: ENVIRONMENTAL SCIENCE AN COLLEGE: BEHAVIORAL SOCIAL SCI
Double Degree: SPANISH LANG, LITERATURE

GVPT306	GLBL ENVIRONMENTAL PLTCS	A	3.00	3.00	12.00	
HONR299I	THE PRACTICE OF SCIENCE	A+	3.00	3.00	12.00	DSNS, SCIS
MLAW358O	SPEC TOPICS ENVIR LAW	A+	3.00	3.00	12.00	

SPAN363 LTN AM LIT & CULT III A 3.00 3.00 12.00 DSHU, DVUP
SPAN408Q CULINARY LANDSCAPES A+ 3.00 3.00 12.00

**** Semester Academic Honors ****

Semester: Attempted 15.00; Earned 15.00; QPoints 60.00; GPA 4.000
UG Cumulative: 77.00; 77.00; 308.00; 4.000

Spring 2020
MAJOR: ENVIRONMENTAL SCIENCE AN COLLEGE: BEHAVIORAL SOCIAL SCI
Double Degree: SPANISH LANG, LITERATURE

ENGL392 LEGAL WRITING A 3.00 3.00 12.00 FSPW
ENSP330 INTRO TO ENVRNMNTL LAW A+ 3.00 3.00 12.00
HONR238C ENERGY & CLIMATE POLICY A+ 3.00 3.00 12.00 DSSP
SPAN370 SPAN BUS I A+ 3.00 3.00 12.00

**** Semester Academic Honors ****

Due to COVID-19 pandemic, unless the student elects the regular grading method per course, P grades for undergraduate courses and S grades for graduate courses in effect for Spring 2020, and allowed to satisfy all degree requirements.

Semester: Attempted 12.00; Earned 12.00; QPoints 48.00; GPA 4.000
UG Cumulative: 89.00; 89.00; 356.00; 4.000

Fall 2020
MAJOR: ENVIRONMENTAL SCIENCE AN COLLEGE: BEHAVIORAL SOCIAL SCI
Double Degree: SPANISH LANG, LITERATURE

ENSP386 INTERNSHIP A+ 3.00 3.00 12.00
ENSP400 CAPSTONE IN ENSP A+ 3.00 3.00 12.00 DSSP
HONR249D ENVIRONMENTAL PROBLEMS A 3.00 3.00 12.00 DSHS
SPAN361 LTN AM LIT & CULT I A+ 3.00 3.00 12.00 DSHU, DVUP

**** Semester Academic Honors ****

HONORS COLLEGE CITATION – UNIVERSITY HONORS

Semester: Attempted 12.00; Earned 12.00; QPoints 48.00; GPA 4.000
UG Cumulative: 101.00; 101.00; 404.00; 4.000

Spring 2021
MAJOR: ENVIRONMENTAL SCIENCE AN COLLEGE: BEHAVIORAL SOCIAL SCI
Double Degree: SPANISH LANG, LITERATURE

HONR268G SCIENCE OF BIRDWATCHING A+ 3.00 3.00 12.00 DSSP
SPAN373 SPANISH IN THE MEDIA A+ 3.00 3.00 12.00
SPAN408P CUBAN CINEMATIC CULTURE A+ 3.00 3.00 12.00
SPAN478A SPAN & SPAN-SPKNG COMM A+ 3.00 3.00 12.00

**** Semester Academic Honors ****

Semester: Attempted 12.00; Earned 12.00; QPoints 48.00; GPA 4.000
UG Cumulative: 113.00; 113.00; 452.00; 4.000

**** Degree Information ****

COLLEGE OF BEHAVIORAL AND SOCIAL SCIENCE
Bachelor of Science
Awarded 05/21/21
Summa Cum Laude
ENVIRONMENTAL SCIENCE AND POLICY
CONCENTRATION: ENVIRON POLITICS & POLICY

**** Degree Information ****
COLLEGE OF ARTS AND HUMANITIES
Bachelor of Arts
Awarded 05/21/21
Summa Cum Laude
SPANISH LANG, LITERATURES, CULTURES

UG Cumulative Credit : 162.00
UG Cumulative GPA : 4.000

Cale Jaffe
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to offer an exceptionally strong and enthusiastic recommendation for Sheena Patel, who has applied for a clerkship in your chambers. I came to know Sheena as a student in the Environmental Law and Community Engagement Clinic for the Spring 2023 semester. Enrollment in the Clinic is managed through a competitive application process. Once admitted, students must make a significant commitment to working on Clinic cases—13 hours per week, on average, over the course of the semester.

Because of this structure, the Clinic gives me a unique opportunity to assess students in a real-world, office-like environment. In this environment, Sheena has stood out as the top student in the introductory Clinic this Spring semester. Through our one-on-one check-ins to go over her writing and through her outstanding participation in the seminar portion of the Clinic (where we workshopped drafts of briefs and discussed case strategy), I have come to know Sheena as an astoundingly strong student-lawyer.

The Law School imposes a strict curve on graded classes, including clinics. This semester, I had a wonderfully strong group of students; no one merited a “below mean” grade. This strong group made it exceedingly difficult for me to award grades, however, as only one student could be given an A- or better. Sheena earned that lone A for her incredible leadership, hard work, and top-notch legal thinking. Without a doubt, she is one of the first people I would want to hire to join a legal team.

She is exceptionally bright and among the hardest working students I have met. She volunteered for work on three cases: 1) assessing possible solutions for renters in housing that could be flooded due to sea-level rise and climate change; 2) helping a family living immediately adjacent to a proposed asphalt plant navigate the environmental permitting process; and 3) researching and drafting comments on the Virginia Department of Environmental Quality’s (“DEQ”) complex proposal to withdraw from the Regional Greenhouse Gas Initiative, better known as RGGI.

Sheena’s work on the RGGI comment letter perfectly highlighted her strengths. Our client for those comments was the Virginia Clinicians for Climate Action, an organization of medical professionals concerned about climate change and the worsening health impacts of increasing greenhouse gas pollution.

Drafting comments from the perspective of medical clinicians was challenging, as it required Sheena to synthesize medical-journal research on the Social Determinants of Public Health with the administrative law questions posed by Virginia DEQ’s regulation. Given Sheena’s impressive background—majoring in Environmental Science and completing projects for the U.S. Department of Agriculture and Department of Justice—she was a natural fit for this project. She excelled in helping our team digest the medical literature and joined with other students in translating that research into language that could resonate with a layperson audience.

What was most impressive about Sheena’s work on the RGGI comments, however, was her take-charge initiative. Our client was so impressed by Sheena’s RGGI letter that they asked if our Clinic wanted to partner with them in drafting a medical-journal commentary on the same subject. Although the semester was nearly complete, Sheena did not hesitate. Sheena volunteered with two other students to assemble a first draft of the medical-legal commentary just before final exams were set to begin. It was a remarkably strong effort completed at a breakneck speed.

That commitment to work likely explains Sheena’s decision to accept the mantle of Editor-in-Chief of the Virginia Environmental Law Journal while also remaining on the Editorial Board for the Virginia Law Review. Indeed, I can think of only one other student in my time at the University of Virginia who has taken on that double responsibility.

Sheena’s work on behalf of the family living near the proposed asphalt plant highlighted her kindness and ability to sympathize with clients in difficult situations. She made sure to listen carefully to their concerns and was patient in walking through their legal options with them. She showed similar care and patience in working on the rental/sea-level rise research.

Finally, it should go without saying that Sheena was a wonderful contributor during the seminar portion of our Clinic, when we would discuss all of the students’ projects in addition to debating supplemental readings that I would assign. Sheena is sincere, thoughtful, hard-working, and kind to her colleagues. Because of these traits, I have no doubt she would be an excellent addition to any judicial chamber. I would hire Sheena in a minute.

Sincerely,

Caleb Jaffe - cjaffe@law.virginia.edu - (434) 924-4776

Cale Jaffe
Professor of Law, General Faculty
Director of the Environmental Law & Community Engagement Clinic

Caleb Jaffe - cjaffe@law.virginia.edu - (434) 924-4776

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend highly Sheena Patel for a clerkship in your chambers. Sheena is a bright young woman, who I think would make a great clerk in your chambers.

I first met Sheena when she enrolled in my Evidence class in her second year. I teach Evidence in a fairly traditional way, using a combination of Socratic method, lecture, and voluntary class discussion. Sheena's class had only 46 students in it, which was much smaller than my typical Evidence class because it was in the fall and so had no first-year students. I thus got to know the students better than I typically would. Sheena was always well prepared and seemed engaged in the class. Whenever I called on her, she had a good sense of what question I was asking and why. I was thus not surprised that Sheena did well on the exam, earning an A- for the course.

Sheena's performance in my class has been typical of her time at the law school. After two years, her GPA stands at 3.62, which places her just barely outside the top quarter of her class. Even more impressive, she has put together this record while throwing herself into the intellectual and extracurricular life of the law school. She is the Editor-in-Chief of the Virginia Environmental Law Journal and also serves on the editorial board of the Virginia Law Review; she is a fellow in the Program in Law and Public Service and also serves as Treasurer and Pro Bono Project Volunteer for Virginia Environmental Law Forum. Sheena also won the "Best First-Year Brief" award in her Legal Research & Writing class.

This summer Sheena will be working at the Southern Environmental Law Center here in Charlottesville. After clerking, she plans to apply to various public-interest fellowships and programs, including the DOJ Honors Program in the Environmental & Natural Resources Division. Her ultimate goal is to work at an environmental non-profit firm, a goal I have little doubt she will achieve. The reason is not only that she is smart and passionate about the environment. It's also because Sheena is a self-starter. The daughter of immigrants, she reports that she has had to navigate her entire education more or less on her own (with the only guidance from her parents being the clear, but vague, directive to "do well"). So she knows that nothing will be handed to her and that she's got to take, and make best use of, every opportunity she gets. I can also vouch for the fact that she's a delight to talk with and be around.

For those same reasons, I also think Sheena will make a terrific legal clerk. Still, if you have any questions about her, or would like to discuss her candidacy any further, please do not hesitate to email me (cbarzun@law.virginia.edu) or call me at any time (434-924-6454), and I will call you back at your convenience.

Sincerely,

Charles L. Barzun

June 06, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to support Sheena Patel's application for a clerkship in your chambers. I taught Sheena in my Energy Regulation and Policy course at the University of Virginia School of Law. Sheena was one of the top students in my class. She is a diligent worker, a sharp legal thinker, and a passionate advocate for the issues that are near and dear to her—including environmental law and environmental justice. I know Sheena is interested in a career in public service, and I believe a clerkship with you would set her up well for success on that path.

Sheena is a hard-working, driven student who possesses a knack for grasping complex, technical legal work and understanding its implications for people on the ground. Sheena wrote one of the top two exams in my Energy Law and Policy course. This can be a difficult class for many students, as it involves elements of adminis-trative law, economic regulation, and complex federal-state jurisdictional dynamics. But Sheena's exam demonstrated excellence on both the more technical legal side and the practical side. On the technical side, Sheena was able to correctly analyze the difficult legal boundaries between the federal government's regulatory jurisdiction under the Federal Power Act (the federal statute that gives the federal government the power to regulate most interstate components of our electricity grid) and the states' traditional authority over in-state production and consumption of electricity. On the more practical side, Sheena was able to tie this complex regulatory regime to its on-the-ground impacts for individuals. Unique amongst her peers, Sheena understood that how we govern energy can have important implications for the consumers who demand certain services out of their electricity utility, the citizens who want to participate in the decisions made at the state and local level about the provision of energy services, and the workers in energy industries whose livelihood is tied to the production of certain resources. I believe Sheena's ability to connect complex legal doctrine to its real-world impacts will make her well-equipped to serve as a law clerk.

Additionally, Sheena is one of the hardest-working and busiest students I have met at the University of Virginia. This was clear to me in the classroom, as Sheena showed up every day to class prepared to discuss the material, engage with her fellow students, and ask thoughtful questions. I could always rely on Sheena for an insightful comment or query during our class debates. Outside of the classroom, Sheena is involved in multiple student organizations, including two law journals, the environmen-tal law society, a clinic, a public interest mentoring program, and extracurricular pro bono work. For many of these organizations, Sheena has taken on a leadership position. And she is a constant presence at the law school, continuously organizing events and creating opportunities for her peers to connect with each other and with practicing lawyers. It is remarkable that Sheena is able to balance this active extracurricular schedule with her rigorous academic one. It is obvious to me that Sheena sees part of her role at the law school as being an active participant in her community, not just a student. I believe this attitude will serve her well as both a law clerk and, later, as an attorney.

In short, Sheena is a smart and capable law student, a self-directed and self-driven individual, and a valuable member of any community. I believe she will make an excellent law clerk, and I hope you consider her application. I would be delighted to talk to you about Sheena at any time; you can reach me via email at agocke@law.virginia.edu or via phone at 443-472-2036.

Thank you so much for your time and consideration.

Sincerely,

/s/

Alison Gocke
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Sheena Patel

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The attached writing sample is an abridged version of a legal brief that I wrote for a first-year brief writing and oral argument competition in March 2022. In addition to receiving the Bracewell Award for Best Legal Brief for this piece, I also placed among top three oralists for my mock oral argument.

This is an appellee's brief, in which I am representing Carter B. Donovan. According to the provided prompt, Appellant Zomba Recordings LLC (Zomba) filed a copyright infringement action under the Copyright Act of 1976, 17 U.S.C. §§ 101 in the U.S. District Court for the Southern District of New York against Appellee Carter B. Donovan. The court below granted Donovan's motion for summary judgment, holding that the copying was de minimis as a matter of law because the sample is so distorted that an ordinary lay listener could not possibly discern the sample's existence in Donovan's song. Zomba appealed the court's decision, and the case is now in the U.S. Court of Appeals for the Second Circuit.

This writing sample is my own work product and has not been substantially edited by any other person. Various introductory sections of the brief, including the table of contents, table of authority, and procedural history have been omitted for the purpose of concision.

QUESTIONS PRESENTED

I. Did the district court correctly hold that the de minimis exception applies in a sound recording copyright infringement case?

II. Did the district court correctly hold that a small artist's copying is de minimis as a matter of law when a 0.94 second fragment of a song consisting of a two-note sequence and a singular lyric was sampled in a mashup, it was repeated only twice in the allegedly infringing mashup, and it was distorted such that it was not easily recognizable by a lay observer?

STATEMENT OF THE CASE

Donovan is a nineteen-year-old aspiring mashup artist. Since the age of sixteen, he has had a passion for integrating different sound recordings to create innovative pieces. He follows musicians like Gregg Gillis—who is known for using exclusively sampled sounds to create award-winning music—who are demonstrating that mashups are an emergent art form. To make his mashups, Donovan utilizes digital sampling technology which allows musicians to use materials previously recorded by other artists to produce a new sound. Generally, Donovan selects sounds from MP3 files or iTunes and uses a software called Musical Instrument Digital Interface to isolate and manipulate the sounds. His mashups contain no original material.

In late 2019, Donovan created a collection of mashup songs. One of the songs in Donovan's collection, "Break It Down," includes a portion of the sound recording of "(You Drive Me) Crazy," a 1999 pop song by Britney Spears. Zomba holds the copyright to the sound recording of Spears' song. Donovan sampled 0.94 seconds of "(You Drive Me) Crazy." Given the minimal quantity of sampling, the burdensome and impractical process of obtaining copyrights, and the fact that this is a commonplace practice in the musical industry, Donovan did not get permission from Zomba before taking the sample. The sampled fragment consists of a

two-note sequence accompanied by the lyric "crazy," sung by Spears and other female singers. Spears' voice does not stand out in the song lyric. In the mashup, Donovan did not alter the drawn-out timing of the sample, but he significantly lowered the pitch and superimposed various other tracks on the sample. The sample appears only twice in this distorted form—once within the first five seconds and again about thirty seconds into the song. By distorting the short fragment, Donovan hoped to incorporate an Easter egg, a hidden sound that the common listener would not uncover, into the mashup. In Spears' original song, the allegedly sampled portion is repeated only eight times in a span of three minutes and eighteen seconds.

In December 2019, Donovan posted his mashup collection on BandCamp, YouTube, and SoundCloud, where it was available to download for free. As his popularity increased, he started his own online DJ show and began playing his mashups at small clubs. In January 2020, Donovan released a CD of his mashups which contains "Break it Down." He has distributed several CDs to family and friends and sold about 1,000 copies to the public.

In April 2020, Zomba's IT department discovered that Donovan had sampled from "(You Drive Me) Crazy." On June 3, 2020, Zomba sent Donovan a cease-and-desist letter, threatening to sue for copyright infringement. By July, BandCamp, Youtube, and SoundCloud restricted Donovan from posting "Break it Down" due to potential infringement issues.

ARGUMENT

I. THE SUBSTANTIAL SIMILARITY ANALYSIS IS APPLICABLE IN CASES OF ALLEGED INFRINGEMENT OF A SOUND RECORDING COPYRIGHT.

The district court did not err in holding that the plaintiff must show that the "second work bears 'substantial similarity' to the protected expression in the earlier work to establish unlawful appropriation. To make a prima facie case for copyright infringement, a plaintiff must show proof of (1) ownership of the copyright; (2) actual copying of the copyrighted work; and

(3) unlawful appropriation of the copied material.[1] In the present case, it is undisputed that Zomba owns the sound recording copyright and that Donovan, by digitally sampling "(You Drive Me) Crazy," admitted to actual copying. It is the third element that is at issue on appeal.

To establish unlawful appropriation, the substantial similarity analysis must be employed because it best promotes the dual goals of copyright law; there are no meaningful distinctions between sound recordings and other forms of copyrights, which have been consistently subject to the de minimis exception; and the text, structure, and legislative history of the Copyright Act of 1976 support the adoption of a substantial similarity standard.

A. The Substantial Similarity Standard Best Promotes the Dual Goals of Copyright Law.

Application of the substantial similarity standard to all instances of copyright infringement best advances the dual aims of copyright law. As stated in the U.S. Constitution, a central purpose of copyright law is to "promote the progress of the sciences and useful arts."[2] This goal is accomplished "by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[3] That is, the public's interest in creative expression is balanced against a creator's right to protect their property.[4]

The substantial similarity standard of infringement best accommodates these competing aims of copyright law. Under the substantial similarity test, copying must be greater than de minimis to constitute unlawful appropriation; when copying is de minimis, it is so trivial that it is not actionable and cannot support a claim of copyright infringement.[5] By granting an exception for de minimis copying, the substantial similarity framework allows for some copying for the

[1] Laureyssens v. Idea Grp., Inc., 964 F.2d 131, 139 (2d Cir. 1992), *as amended* (June 24, 1992).
[2] U.S. CONST. art. I, § 8, cl. 8.
[3] *Id.*
[4] *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
[5] *See* TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588, 606–07 (S.D.N.Y. 2013).

purposes of creativity while also protecting property interests where copying exceeds a certain threshold of similarity. Artists, by nature, borrow, and it is integral that courts adopt a standard that enables artists to continue their creative pursuits.[6] In fact, the Supreme Court has emphasized that: "there are…few…things, which…are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow."[7]

Unlike the substantial similarity framework, the alternate per se rule of infringement does not advance the goals of copyright law. Under a per se rule, any amount of unauthorized copying of sound recordings, regardless of how trivial, constitutes infringement.[8] This bright line rule stifles creativity and limits artistic freedom by giving copyright owners a monopoly over unique sounds.[9] If the practice of borrowing is completely prohibited, art forms like mashups—whose entire purpose is to sample and combine sounds created by other artists—would cease to exist.[10]

It may be argued that under a per se rule, artists nonetheless retain the liberty to obtain licenses.[11] Although licensing may seem like a substitute method for striking a balance between the goals of copyright law, licensing does not sufficiently account for the interests of artists.[12] Not only does the licensing process require vast amounts of time and money, but it also hinders the very purpose for which the artist wishes to obtain a license. Often, artists seek to borrow a sound when it is highly valued, at its peak popularity, or most pertinent to the artist's goals.[13] However, the licensing requirement is prohibitive as it compromises the artist's ability to capitalize on a sound in a timely manner—getting permission can take several months and there

[6] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994).
[7] *Id.* (citing *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845)).
[8] *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005).
[9] *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 887 (9th Cir. 2016).
[10] *See* Michael Allyn Pote, *Mashed-up in Between: The Delicate Balance of Artists' Interests Lost Amidst the War on Copyright*, 88 N.C. L. REV. 639, 689 (2010).
[11] *Bridgeport Music, Inc.*, 410 F.3d at 801.
[12] *See VMG Salsoul, LLC*, 824 F.3d at 887.
[13] Pote, *supra* note 10, at 649.

are no centralized licensing clearinghouses for small artists like Donovan. In the context of mashups specifically, mashups are comprised of dozens of pieces, so obtaining a license for each of these individual works would be a cumbersome process. Likewise, even though artists are free to *recreate* sounds under the per se approach, creativity is still impeded because the nature and culture of mashup music is directly antithetical to independent sound recording.[14] In light of the goals of copyright law and the failure of the per se approach in meeting them, it is not surprising that the substantial similarity standard has been applied consistently by courts across the nation to virtually all forms of copyright infringement actions, including music sampling cases.[15]

B. There Are No Meaningful Distinctions Between Sound Recording and Music Composition Copyrights.

Sound recordings are not meaningfully different from other forms of copyrighted works, and therefore do not require a separate standard of infringement. To establish unlawful appropriation, the Second Circuit has always required that the two works involved in the infringement claim be substantially similar.[16] Although digital sampling of copyrighted sound recordings is an issue of first impression in the Second Circuit, there is no reason to depart from precedent and treat sound recordings any differently from other forms of copyrights.[17]

For instance, both musical compositions[18] and sound recordings are identified as categories of works protected under the Copyright Act.[19] While a musical composition is comprised of the underlying written lyrics and music of a work, the sound recording is the performance of that composition which results from the fixation of a series of spoken, musical,

[14] *Id.* at 654, 665.
[15] *See VMG Salsoul, LLC*, 824 F.3d at 881.
[16] Laureyssens v. Idea Grp., Inc., 964 F.2d 131, 139 (2d Cir. 1992), *as amended* (June 24, 1992).
[17] *VMG Salsoul, LLC*, 824 F.3d at 882.
[18] While musical compositions are not explicitly mentioned in 17 U.S.C. § 102, the statute does include "musical works, including any accompanying words," which extend to musical compositions. *See* 17 U.S.C. § 102 (a)(2).
[19] 17 U.S.C. §§ 102 (a)(2), 102(a)(7).

or other sounds.[20] Undoubtedly, there are some distinctions between the two types of works, but the differences are not pertinent for the purposes of determining the proper standard of infringement—simply because two different types of expression are being protected does not justify the use of a different standard altogether. It is longstanding practice that the de minimis exception applies to musical composition copyright actions, and digital samples of sound recordings are no more unique of a taking.[21]

When sounds fixed in the medium of the copyright holder's choice are sampled, it may be contended that the act of sampling, "is a physical taking rather than an intellectual one."[22] Even if the digital sampling of sound recordings is a physical taking, Second Circuit cases involving different forms of media and arguably physical takings of entire copyrighted objects have still opted for the substantial similarity analysis, sustaining the de minimis exception. For example, in *Sandoval v. New Line Cinema Corp.*, the circuit court utilized the substantial similarity analysis in an infringement action regarding the appropriation of the plaintiff-photographer's ten copyrighted photos in a motion picture.[23]

In fact, district courts across the nation agree that substantial similarity applies to sound recording copyrights.[24] Before the Ninth Circuit's 2016 ruling in *VMG Salsoul, LLC*, the district courts' highest authority on the issue of sampling of sound recordings was the Sixth Circuit's *Bridgeport Music, Inc.* decision. Even in the absence of any other authority, lower courts avoided the *Bridgeport Music, Inc.* per se approach and continued to look to substantial similarity.[25]

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[20] *See* 17 U.S.C. § 101; Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004).
[21] *See*, *e.g.*, *Newton*, 388 F.3d 1189 (using substantial similarity in a musical composition infringement case).
[22] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 802 (6th Cir. 2005).
[23] 147 F.3d 215 (2d Cir. 1998). *See also* Ringgold v. Black Ent. Television, Inc., 126 F.3d 70 (2d Cir. 1997) (employing the substantial similarity inquiry in an infringement action regarding the use of an artist's story quilt in a poster on a television program).
[24] VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 881 (9th Cir. 2016).
[25] *See*, *e.g.*, TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588 (S.D.N.Y. 2013); TufAmerica, Inc. v. WB Music Corp., 67 F. Supp. 3d 590 (S.D.N.Y. 2014); Williams v. Broadus, No. 99 CIV. 10957, 2001 WL 984714 (S.D.N.Y.

[*Paragraph on support from leading copyright treatises/scholars omitted.*]

C. The Language, Structure, and Legislative Intent of the Copyright Act of 1976 Support a Substantial Similarity Analysis.

An analysis of the structure and statutory scheme of the Copyright Act of 1976 reveals the congressional intent of employing a substantial similarity approach to establish unlawful infringement. First, 17 U.S.C. § 102 enumerates the subject matter of copyright; second, 17 U.S.C. § 106 grants copyright owners the exclusive rights to reproduce the copyrighted work in copies or phonorecords and to prepare derivative works based upon the copyrighted work; and third, 17 U.S.C. § 114 limits the scope of those rights as related to sound recordings.

A comprehensive reading of 17 U.S.C. § 106 shows that the statute grants a de minimis exception to all copyright holders. Provided that the definition of "sound recordings" in 17 U.S.C. § 101 is neutrally worded and that 17 U.S.C. § 102 treats sound recordings the same as all other works enumerated in the provision, it follows that there exists a de minimis exception for cases involving copying of sound recordings.[26] The language of the Copyright Act provides no indication that Congress intended to adopt a different rule for sound recording copyrights.[27]

Regarding the scope of exclusive rights in sound recordings, 17 U.S.C. § 114 indicates:

> "The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording."[28]

Based on a plain reading of the text and its placement in a section in which every clause begins

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Aug. 27, 2001); New Old Music Grp., Inc. v. Gottwald, 122 F. Supp. 3d 78 (S.D.N.Y. 2015); Jean v. Bug Music, Inc., No. 00 CIV 4022, 2002 WL 287786 (S.D.N.Y. Feb. 27, 2002); Saregama India, Ltd. v. Mosley, 687 F. Supp. 2d 1325 (S.D. Fla. 2009), *aff'd on other grounds*, 635 F.3d 1284 (11th Cir. 2011). *But see* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991). *Grand Upright* is the singular exception to the use of the substantial similarity inquiry for cases regarding digital sampling of sound recording copyrights arising in district courts within the Second Circuit.

[26] *VMG Salsoul, LLC*, 824 F.3d at 882.

[27] *Id.*

[28] 17 U.S.C. §114(b).

with limiting language, it is evident that 17 U.S.C. § 114 only imposes qualifications on the rights described in 17 U.S.C. § 106.[29] That is, 17 U.S.C. § 114 is a limiting provision intended to provide immunity in cases where musicians create a song that imitates or sounds similar to that of another musician's, but there is no actual copying or sampling.[30] Consequently, it is erroneous to conclude that the use of the word "entirely" in 17 U.S.C. § 114 gives a sound recording owner the exclusive right to sample his recording and that *any* unauthorized use of a digital sample taken from a copyrighted sound recording is infringing.[31] A section that enumerates restrictions cannot be read to be an expansion of the rights of copyright owners.[32] Provided that 17 U.S.C. § 114 is a limiting section, the court in *Bridgeport Music, Inc.* committed a logical fallacy in interpreting the provision.[33] By disproportionately focusing on the word "entirely," the Sixth Circuit evaded a natural reading of the statute and wrongly concluded that the exclusive rights of a copyright holder extend to any recording that *does not* consist entirely of independent sounds.[34] "A statement that rights do not extend to a particular circumstance"—when a recording is comprised of entirely independent sounds—"does not automatically mean that the rights extend to all other circumstances"—when a recording is comprised of any unauthorized use.[35]

[*Paragraph on legislative history omitted*.]

II. DONOVAN'S COPYING IS DE MINIMIS AS A MATTER OF LAW.

The trial court did not err in finding Donovan's sampling of "crazy" to be de minimis as a matter of law. Observability is a threshold requirement in all cases of copyright infringement because a taking must be recognizable before it can be deemed infringing. Under the

[29] *VMG Salsoul, LLC*, 824 F.3d at 884.
[30] *Id.* at 883, 889
[31] *Id.* at 888.
[32] *Id.* at 883.
[33] *VMG Salsoul, LLC*, 824 F.3d at 871.
[34] *Id.* at 884.
[35] *Id.*

observability test, Donovan's use of "crazy" is de minimis as a matter of law since an ordinary person would not be able to identify his appropriation. The copying is also de minimis under the fragmented literal similarity test as the qualitative and quantitative significance of the copied portion in relation to the original work are insufficient to maintain an infringement claim.

A. Observability is a Threshold Requirement in All Cases of Copyright Infringement.

Observability is a required element in every infringement case.[36] If the taking is not noticeable, it is not detracting from the original work.[37] In other words, infringement is limited to instances where an average lay observer would recognize the sampled portion of the original work in the allegedly infringing work—if the observer cannot identify the sample, the copying is ruled de minimis as a matter of law.[38]

Thus far, the Second Circuit has only applied the observability test to visible mediums such as photos, films, and artwork.[39] Observability is more likely to be at issue in the copying of visual works in comparison to other materials like written works where observability is not contested as the exactly copied words are blatantly observable. In contrast, the nature of visual works lends itself to such inquiry—when appropriated, visual works may be in the background, out of focus, or even obstructed from view.[40]

In the same way that visual works like paintings or photos lend themselves to background

[36] *See* Williams v. Broadus, No. 99 CIV. 10957, 2001 WL 984714, at *4 (S.D.N.Y. Aug. 27, 2001) (stating that observability is a necessary but not sufficient condition for demonstrating substantial similarity).
[37] Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946).
[38] Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004).
[39] *See generally* Sandoval v. New Line Cinema Corp., 147 F.3d 215 (2d Cir. 1998) (utilizing the observability test to establish substantial similarity where the plaintiff-photographer's photos were used in the background of a motion picture); Ringgold v. Black Ent. Television, Inc., 126 F.3d 70 (2d Cir. 1997) (employing the observability inquiry to establish substantial similarity as the artist's story quilt was seen on a poster in the background of a television program).
[40] *See Sandoval*, 147 F.3d at 218 (utilizing the observability test where the plaintiff's photos were out of focus, in poor lighting, and at a great distance in the background of a motion picture); *Ringgold*, 126 F.3d at 77 (employing the observability inquiry where the artist's story quilt appeared for about thirty seconds in the background of a television program).

use and pose an issue of observability, musical artists often conceal sampled sound recordings through distorting or obscuring the piece using a variety of techniques. Although the Second Circuit has not yet heard a case regarding a mashup, a musical mashup is similar to these visual works as there is no harm to the copyright owner if the alleged copying cannot be observed or heard by a lay person.[41] A plaintiff's interest in preventing infringement is the potential financial return from his compositions, but if the appropriation is so trivial that it cannot be recognized by the public, then the copier has received no benefit from the original material.[42] Whether a work is visual, musical, or literary, observability is a minimum requisite for an infringement action.[43]

B. Donovan's Use of "Crazy" is De Minimis Under the Observability Test.

Donovan's copying is de minimis under the observability test as it cannot be observed by a lay person. In determining observability, courts look to the length of time the copyrighted work appears in the allegedly infringing work and its prominence in that work.[44] To be prominent, the copied portion must be at the forefront of the allegedly infringing work and cannot be vastly altered, ensuring that the distinct style of the original artist is discernible in the infringing piece.

For example, in *Ringgold v. Black Ent. Television, Inc.*, the court did not find the use of an artist's story quilt in a poster on a television program to be de minimis because the painting was clearly visible in a four to five second shot that allowed for easy recognizability, and it was also partially visible in eight other smaller shots, for an aggregate of about twenty-seven seconds.[45] As a result, an average lay observer could likely discern the African American figures painted in the plaintiff's unique, colorful style.[46] Conversely, in *Sandoval v. New Line Cinema*

[41] *Arnstein*, 154 F.2d at 473.
[42] *Id.*
[43] *See, e.g.*, VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 880 (9th Cir. 2016) (applying the observability test to a musical sample where the defendant sampled and distorted a single horn hit from the plaintiff's composition).
[44] *Ringgold*, 126 F.3d at 75.
[45] *Id.* at 77.
[46] *Id.*

Corp., the defendants' copying of photographs in a motion picture was deemed de minimis and unactionable.[47] Unlike the artwork in *Ringgold*, the photos appropriated in the film were not displayed with sufficient detail for the average lay observer to identify the subject matter or style of the photos—they were poorly lit, out of focus, at a great distance, and appeared only briefly.[48]

Though the observability test has only been used in the Second Circuit in cases involving visual works, in *VMG Salsoul, LLC*, this test was applied to a musical sample.[49] The defendant sampled a single horn hit from the plaintiff's composition, isolated the horns by filtering out other instruments, changed the key, truncated it, and added effects.[50] In addition to being distorted, the portion was less than a second of the defendant's work, occurred very few times, was easy to miss, and did not sound identical to original song.[51] As such, the court held that a juror could not find that an average audience would recognize the appropriation of the horn hit.[52]

Here, Donovan's sampling must be dismissed as de minimis as a matter of law under the observability test. The sampled fragment is heard only twice for less than one second in the mashup resulting in no cumulative effect on an audience. While the drawn-out timing of the sample is left unchanged, the singular lyric passes by so quickly that it is improbable that a lay listener would be able to identify the sample as originating from Spears' song. The timing is also obscured by the simultaneous tracks playing on top of the lyric "crazy," preventing a listener from linking the sample to Spears' song. Further, the prominence of the copied portion is limited in Donovan's work. The lowered pitch—so low that it seems to depict a deeper masculine

[47] 147 F.3d 215, 218.
[48] *Id.*
[49] 824 F.3d 871, 879.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 880. *See also* TufAmerica, Inc. v. WB Music Corp., 67 F. Supp. 3d 590, 598 (S.D.N.Y. 2014) (holding that the defendant's use of the word "oh" from plaintiff's composition was de minimis because the sample appeared only faintly in the background of defendant's allegedly infringing song and was barely perceptible to a lay listener).

voice—and its placement in the background of the mashup would not permit an ordinary lay observer to discern Spears' singing style heard in "(You Drive Me) Crazy." Accordingly, the two works are not substantially similar under the observability test, and Zomba cannot establish improper appropriation to succeed in bringing its infringement action.

C. Donovan's Use of "Crazy" is De Minimis Under the Fragmented Literal Similarity Test.

Donovan's copying is also de minimis under the fragmented literal similarity test. The fragmented literal similarity test establishes substantial similarity by weighing the qualitative and quantitative significance of the copied portion in relation to the plaintiff's original work as a whole.[53] When assessing quantitative traits of the works, courts look to the amount of the copyrighted material copied, whereas the qualitative analysis relates to the expression of the work.[54] In considering qualitative significance, courts interpret the role of the copied portion in the original song, as well as the distinctive character of the copied portion. In general, courts have indicated that "the quantitative analysis of two works must always occur in the shadow of their qualitative nature."[55] Since this test involves literal copying and qualitative and quantitative significance are viewed on a sliding scale, a sample with no quantitative significance can be found to be more than de minimis only where it exhibits extremely high qualitative significance.

When both the quantitative and qualitative significance of the copied portion are low, the Court should dismiss the case as de minimis as a matter of law. In one of the several claims brought in *TufAmerica, Inc.,* the defendant took a three-second-long drum sequence from the plaintiff's song, and the appropriation was dismissed as de minimis.[56] The sample totaled three

[53] TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588, 598 (S.D.N.Y. 2013).
[54] Ringgold v. Black Ent. Television, Inc., 126 F.3d 70, 75 (2d Cir. 1997) (citing 4 NIMMER ON COPYRIGHT § 13.03[A][2] (2021)).
[55] *TufAmerica, Inc.*, 968 F. Supp. 2d at 599.
[56] *Id.* at 605.

seconds—less than one percent—of the nearly six-minute song, and the sequence was not the heart of the song nor qualitatively important or unique in any other way.[57] Likewise, an additional claim brought in the same case challenged a single six-second sample of the same song and was also dismissed as de minimis.[58] The sample accounted for less than two percent of the six-minute song and was not thematically significant to the song title or content.[59]

Similarly, in *TufAmerica, Inc. v. WB Music Corp.*, the court dismissed the copyright infringement complaint for the sound recording upon finding trivial, if any, quantitative and qualitative significance of the defendant's copying of the word "oh" in his recording from the plaintiff's work.[60] Here, the sampled portion was less than one second of a roughly two-and-a-half-minute recording, and the court concluded that the word "oh" was a common word that added no special thematic significance to the song nor went to the heart of the composition.[61]

On the contrary, a sample with low quantitative significance will be more than de minimis only where it simultaneously exhibits a high qualitative significance. For example, in *Elsmere Music, Inc. v. Nat'l Broad. Co.*, the court left the question of substantial similarity for the jury where the words "I Love" from the jingle, "I Love New York" were copied in a Saturday Night Live sketch.[62] While only two of forty-five words were copied, the "musical phrase taken was the heart of the copyrighted composition," and the tune of the parody was

[57] *Id.*
[58] *Id.* at 606.
[59] *Id.*; *see also id.* at 604 (dismissing a claim where a purely musical four-second segment repeated four times was only sixteen seconds of the original six-minute song and was not thematically consistent with the title); *id.* at 607 (finding the copying of three seconds of a six-minute-and-twenty-second-long original song with a sequence from the defendants' song which "include[d] punchy guitar chords…[and] distinctive shouted lyrics to be de minimis as the segment was not repeated nor thematically relevant to the original song).
[60] 67 F. Supp. 3d 590, 599 (S.D.N.Y. 2014).
[61] *Id.*; *see also* Jean v. Bug Music, Inc., No. 00 CIV 4022, 2002 WL 287786 (S.D.N.Y. Feb. 27, 2002) (reasoning that the copied phrase "Clap your hands now, people clap now," from the defendant's song which uses the phrase "Clap your hands, y'all, 't's'all right" was de minimis because only three words were copied, and the lyrics come from a common phrase).
[62] 482 F. Supp. 741, 744 (S.D.N.Y.), *aff'd on other grounds*, 623 F.2d 252 (2d Cir. 1980).

easily recognizable as having been appropriated from the copyrighted jingle.[63]

Where the quantitative significance of the copied portion relative to the original work is *extremely* minor, courts require a disproportionately high qualitative significance for the copying to be more than de minimis. Such extreme case was seen in *TufAmerica, Inc. v. Diamond* where the defendants sampled a distinctive vocal sequence from the plaintiffs' song "Say What."[64] The one-second sample was a single utterance of the phrase "say what" and was repeated only nine times in the original, eight-minute work.[65] Even with these repetitions, the samples were merely two percent of the song, but the copying was still not de minimis when considered in conjunction with the vast qualitative significance.[66] Since the copied phrase was the entire title of the song and was continuously repeated, the court found a very high qualitative significance that offset the marginal quantity of copying and therefore posed a jury question.[67]

Here, Donovan's sample is quantitatively insignificant, and the qualitative significance is not high enough to render the copying greater than de minimis. The sample comprises of about 0.94 seconds, or 0.47%, of the original Spears song, which is three minutes and eighteen seconds long. Even if the eight repetitions are taken into account, the sampled segment is still only about four percent of the copyrighted sound recording and is thereby quantitatively insignificant.

To be greater than de minimis, Donovan's sample must be highly qualitatively significant, but this is not the case. "Crazy" is not of vast qualitative significance to "(You Drive

[63] *Id.*; *see also* Williams v. Broadus, No. 99 CIV. 10957, 2001 WL 984714 (S.D.N.Y. Aug. 27, 2001) (holding that a reasonable trier of fact could find substantial similarity even though only two out of fifty-four measures were copied from the original song because the two measures were ascending and descending sets of five notes that appeared in the opening of the composition).
[64] 968 F. Supp. 2d 588, 603 (S.D.N.Y. 2013).
[65] *Id.*
[66] *Id.*
[67] *Id.*; *see also* Pryor v. Warner/Chappell Music, Inc., No. CV 13-04344 RSWL, 2014 WL 2812309 (C.D. Cal. June 20, 2014) (holding that the copying of a two-word sample of plaintiff's song that constituted less than 0.13% of the six-minute song was not so insignificant to be de minimis because it was sung in the artist's signature voice, indicating extreme qualitative significance sufficient to counter the low quantitative significance of the sample).

Me) Crazy." First, Donovan's sample is too short. While the word "crazy" does appear in the title and refrain of "(You Drive Me) Crazy," Donovan did not copy the entire title or the combined phrase as it appears in Spears' song. The sampled word, "crazy" is a part of a larger phrase in the sound recording. It is the phrase as a whole, "you drive me crazy," that is central to the song and gives the song its popularity. This can be distinguished from *Elsmere Music, Inc.* because even though the defendant copied two out of four of the words from a jingle's main slogan, they also copied all four notes of the slogan.[68] Provided that this four-note sequence at issue in *Elsmere Music, Inc.* was the most popular portion of the jingle, the defendant essentially appropriated the entire slogan.[69] In contrast, Donovan has only copied one of four words, and two—not all—of the notes in the title of Spears' song. Second, although it may be argued that Spears' voice adds to the uniqueness and qualitative significance of the sample, Spears is not singing the lyric individually and is accompanied by background singers, meaning that her voice does not stand out in the sample. Unlike *Pryor*, Spears is not singing in a signature voice.[70] Given that "crazy" appears in the title and is repeated eight times in the chorus, it is true that it carries some qualitative significance. However, in light of the low quantitative significance of "crazy" in Spears' song, the qualitative significance of the sample is not sufficient to exceed the threshold of de minimis copying. Therefore, substantial similarity cannot be proven, and Donovan's sampling of "crazy" is de minimis under the fragmented literal similarity test.

CONCLUSION

For the above-stated reasons, Appellee respectfully asks the U.S. Court of Appeals for the Second Circuit to affirm the judgment of the court below.

[68] *See* 482 F. Supp. 741, 744 (S.D.N.Y.), *aff'd on other grounds*, 623 F.2d 252 (2d Cir. 1980).
[69] *Id.*
[70] *See* 2014 WL 2812309, at *7.

Applicant Details

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BA/BS From	**University of California-San Diego**
Date of BA/BS	**May 2017**
JD/LLB From	**University of Arizona James E. Rogers College of Law** **http://www.law.arizona.edu/**
Date of JD/LLB	**May 14, 2024**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**Arizona Journal of Environmental Law and Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Immigration**

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June 19, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker:

I am applying for a clerkship in your chambers following my May 2024 graduation from the University of Arizona (UA) James E. Rogers College of Law. I was born and raised in Los Angeles, California to a migrant Mexican mother and an Indigenous Guatemalan father. I pursued a legal education because of the values they instilled in me: public service, strong work ethic, and compassion. Clerking for you, along with your mentorship, would deepen my understanding of the law and help me become a stronger public interest environmental litigator in the future.

My upbringing and my father's asylum process in this country inspired me to become an advocate for justice. To this end, I have worked for Immigrant Defenders Law Center, interned with Native Hawaiian Legal Corporation, participated in the UA Human Rights Clinic, and served on the executive boards for the Native American Law Students Association and Immigration Law Students Association. Prior to law school, I worked as a congressional staffer in Los Angeles, where I was entrusted to represent the congresswoman before constituents and extensively prepare the member for meetings and events. As a 2L editor with the *Arizona Journal of Environmental Law and Policy* (AJELP), I wrote my Note about the legal inequities that prevent Native communities from fully exercising religious rights to their traditional medicinal plants. This summer I will intern with Earthjustice, a public-interest environmental litigation firm, in Los Angeles, California. And in the coming school year, I will serve as a 3L editor with AJELP and plan to extern with a tribal court.

Attached please find my resume, transcript, and writing sample. Two of my letters of recommendation have been provided under separate cover by UA's faculty support office, and my third letter was submitted via OSCAR. I am available at your convenience for an interview and can travel to Virginia if you prefer to conduct in-person interviews. Thank you for your consideration.

Respectfully,

Sinnai Pedro-Avila

Sinnai Pedro-Avila

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EDUCATION

University of Arizona James E. Rogers College of Law, Tucson, AZ
Candidate for Juris Doctor, May 2024

- Honors & Awards: Dean's Achievement Award; Williams Achievement Award; Mary Anne Richey Public Service Scholarship; Justice Advocates Coalition Public Interest Scholarship
- Journal: *Arizona Journal of Environmental Law and Policy*
- Activities: Native American Law Students Association (Treasurer); Immigration Law Students' Association (Events Coordinator); Environmental Law Society

University of California, San Diego, La Jolla, CA
Bachelor of Arts - Political Science, May 2017

- Honors & Awards: Robert T. Matsui UC Congressional Fellowship; Lambda Theta Nu Sorority, Inc. (National Philanthropy Excellence Award); Multicultural Greek Council (Emerging Leader of the Year Award)
- Semester Abroad: Thammasat University, Thailand, 2015 (Political Science Department)

PROFESSIONAL EXPERIENCE

Earthjustice, Los Angeles, CA
Summer Law Clerk, May 2023 – Current
Providing litigation and policy support to attorneys working with frontline communities advocating for the removal of environmental hazards and enforcing federal, state, and local environmental laws. Writing memorandums of law in support of current and future litigation. Assisting in drafting comments to regulating agencies on behalf of community groups.

International Human Rights Advocacy Workshop, Tucson, AZ
Clinic Student, August 2022 – May 2023
Supported the UN Special Rapporteur on the Rights of Indigenous Peoples with research and writing for a thematic study on tourism's impact on Indigenous Peoples, which will be presented at the UN Human Rights Council in the fall of 2023. Drafted a UN communication addressed to the Guatemalan government on human rights violations.

Lewis Roca, Tucson, AZ
Diversity Legal Writing Intern, February 2023 – April 2023
Performed legal research and wrote memos for litigation and transactional attorneys. Assisted with a research paper, observed an oral argument, and participated in CLE courses regarding best litigation practices.

Native Hawaiian Legal Corporation, Honolulu, HI
Legal Intern, May 2022 – July 2022
Supported litigation attorneys with research and drafted legal memoranda. Synthesized case law and statutory codes into community handouts explaining Native Hawaiians' rights to burial sites, ancestral remains, fishing, bodies of water, and quieting title. Tracked state legislation. Produced a digital pleadings bank to support new attorneys.

United State Congress - Congresswoman Lucille Roybal-Allard, Los Angeles, CA
Field Deputy, October 2018 – May 2021
Represented the member on district matters related to immigration, health, and veterans' affairs. Prepared the member for events by writing memos, talking points, speeches, and background information. Synthesized federal policy updates into bilingual informational handouts and presented them at community events. Wrote congressional letters of support for community grants to government agencies. Monitored an environmental pollution lawsuit (Exide Technologies) and co-coordinated a California congressional letter to the U.S. EPA and U.S. DOJ opposing a bankruptcy settlement that would allow Exide to avoid remediating its pollution. Coordinated large-scale community events and virtual town halls.

Immigrant Defenders Law Center, Los Angeles, CA
Paralegal/Case Management Associate, July 2017 – October 2018
Conducted legal research on human rights violations, prepared court filings, drafted court motions, and interviewed Spanish-speaking adults and children for their declarations. Analyzed criminal and medical records. Created case management plans for mentally disabled clients, which were presented to immigration judges during clients' bond and merits hearings. Interpreted for clients' asylum interviews and psychological evaluations.

Skills & Interests

- Languages: Fluent in Spanish
- Interests: Hiking, collecting Maya textiles, spending time with my Shiba Inu puppy